Written Statement

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Hearing on a Committee Discussion Draft of H. Res. ____, Providing for authority to initiate litigation for actions by the President inconsistent with his duties under the Constitution of the United States.

Committee on Rules
U.S. House of Representatives

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Chairman Sessions, Ranking Member Slaughter, and members of the 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 the draft resolution authorizing litigation to challenge executive actions inconsistent with the President's constitutional duty to faithfully execute the laws.

The draft resolution offers a carefully tailored way for the House of Representatives to obtain a court declaration of the constitutionality of the President's actions. By limiting authorization for House litigation to presidential transgressions relating to the Affordable Care Act, the draft resolution provides a conservative, targeted means for obtaining peaceful judicial resolution of the dispute between Congress and the President over the contours of the Constitution's command that the President "shall take care that the laws be faithfully executed."[1]

I. THE DRAFT RESOLUTION'S CONFORMITY TO THE FOUR-PART TEST RELEVANT TO ASSESSING LEGISLATIVE STANDING:

As you know, on February 26, 2014, I testified before the House Committee on the Judiciary on the topic of "Enforcing the President's Constitutional Duty to Faithfully Execute the Laws." My written testimony for that hearing provides a detailed roadmap, outlining the best possible way to obtain standing to sue the executive to resolve the meaning of a President's duty of faithful execution. I am happy that the draft resolution being considered by the Rules Committee satisfies the four-part test I outlined before the Judiciary Committee, namely:

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[1] U.S. CONST. art. II, § 3.

(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 or any other effective and proportional political remedies.

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

While I will not spend the committee's valuable time restating the case law supporting these four elements, I would ask the committee to include, as an appendix to this testimony, my prior Judiciary testimony that details the federal courts' treatment of these four elements. In this written statement before the Rules Committee, I will update my survey of case law with some recent developments on both legislative standing and the judicial handling of the separation of powers disputes between Congress and the Executive, including a June 2014 Supreme Court decision, *Utility Air Regulatory Group v. EPA,* and a March 7, 2014 decision on legislative standing by the U.S. Court of Appeals for the Tenth Circuit, *Kerr v. Hickenlooper*.[2]

As I stated before the Judiciary Committee, when all of the above four elements are met, a court is highly likely to find in favor of congressional standing. This is the case both because doing so would be squarely within the four corners of existing case law and also because a failure to find standing in such a case would present 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 itself. 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 believe the draft resolution under consideration would satisfy the four-part test, and would maximize the chance of success in gaining legislator standing to assert an institutional injury. Under the draft resolution, for example, element one (explicit legislative authorization) clearly would be satisfied. In addition, given the broad array of

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[2] Kerr v. Hickenlooper, 744 F.3d 1156 (10th Cir. 2014).

unilateral waivers, delays and suspensions the President has issued under the ACA, there are multiple instances in which element two (no private plaintiff is available) can be satisfied.

Element three (no political self-help available) can also be satisfied by the draft resolution, as Congress simply wants the President to execute the ACA as written, thus allowing the political process to play out the way democracy demands. If the ACA—warts and all—were faithfully executed by the President, the American people would be able to assess the workability of the law, and be in an appropriate position to assess the desirability of various amendments or perhaps even repeal.

Indeed, if the President faithfully executed the ACA, democracy itself (or more accurately, constitutional republicanism) would function as it should, allowing the 535 members of Congress, rather than one President, to represent their diverse constituencies and build the broad-based political compromise necessary to fix the myriad problems posed by the ACA as originally written.

What Congress wants, regarding the ACA, is for the law to be faithfully executed as written. Repealing the ACA wholesale, impeaching the President, or cutting off appropriations for unrelated government programs will not "remedy" the problem of Presidential nullification of the ACA through his use of unilateral waivers, delays and suspensions.

While impeachment, for example, is theoretically possible (though politically highly unlikely, given that it requires 67 votes in a Senate[3] controlled by the President's own political party), impeachment would not remedy the problem of an unfaithful execution of the ACA. Impeachment is a chaotic, politically divisive remedy that is reserved for "treason, bribery, or other high Crimes and Misdemeanors."[4] While a failure to faithfully execute the ACA alone could be considered by some to constitute a high crime or misdemeanor sufficient to trigger impeachment, a successful impeachment effort would most likely require a *pattern* of presidential misbehavior involving multiple instances of a failure to faithfully execute various laws, and perhaps other misbehavior as well.

More significant, for purposes of assessing impeachment as an appropriate political remedy for the failure to faithfully execute the ACA is this fact: Impeachment of a President removes the President from office; it does not force the faithful execution of the ACA, or any other law. The succeeding President would need to make his own decision regarding the constitutionality of the impeached President's acts delaying, waving and suspending the laws, and he may or may not continue those acts. The underlying constitutional dispute about faithful execution, in other words, would not get resolved through impeachment. Indeed, to the extent that the succeeding President continued the impeached President's

[3] U.S. CONST. art. I, § 3 ("The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no person shall be convicted without the concurrence of two thirds of the members present.").

[4] U.S. CONST. art. II, § 4.

ACA actions, the country would find itself embroiled in yet another divisive cry for impeachment—yet the underlying constitutionality of the waivers, delays and suspensions of law would not get definitively clarified for the benefit of the American people.

Regarding the viability of political self-help via withholding of appropriations, there is a similar, fatal means-end mismatch. When a President fails to faithfully execute a law, the law enacted by Congress—such as the ACA—has been nullified (thus satisfying element four of the four-part test). Rather than faithfully executing the law according to the instructions provided by Congress, the President has taken it upon himself to decide that certain portions of the law are unworkable, too harsh on certain groups, or represent bad policy altogether.

In this situation, what appropriations should be withheld as a remedy? If Congress wants the ACA to be faithfully executed, should it withhold any appropriations available for carrying out the ACA (which may be quite limited, as most portions of the law are self-executing and do not require appropriations)? No. Withholding appropriations from a law Congress wants faithfully executed is like asking Congress to cut off its nose to spite its face—it would be an overreaction that would make faithful execution of the law harder (if not impossible), and it would undercut the very law Congress wants faithfully executed. It would not, in other words, remedy the problem at hand, which is a failure of faithful execution of the law as written.

To be sure, some have argued that Congress could use its power of the purse to withhold funding for *unrelated* programs such as White House travel, the Department of Homeland Security, the school lunch program, Social Security or the like. The idea seems to be that if Congress cuts off funding for these programs, it will "punish" the President and force him to faithfully execute the ACA or other laws. While such actions may be felt by the President in some way—particularly cutting off funding for things such as White House travel—it would not remedy the lack of faithful execution of our laws. For example, a President whose White House travel budget is cut may simply stop traveling and blame Congress for all the negative implications arising from that: "I couldn't visit the border and assess the crisis of illegal immigration there because Congress cut off my travel funds"; "I couldn't meet with Mr. Putin to negotiate this crisis one-on-one because Congress cut off my travel funds," etc.

Moreover, such actions may cause an already-aggressive President to claim even more unconstitutional power, encouraging him to shuffle money appropriated by Congress to other purposes. A President whose White House travel budget is cut, for example, may decide that he "has" to "borrow" money from another government program to continue necessary White House travel. When Congress understandably complains about such unconstitutional behavior, the President would likely blame Congress: "I didn't want to move the money around, but Congress left me no choice. My staff and I have to continue traveling to protect the interests of the American people."

And consider this: Who gets hurt when such *unrelated* government programs are cut, in a desperate attempt to reign in a President who fails to faithfully execute the laws? The

American people. Their government is not as effective; their benefits are cut; their security is weakened. Understandably, the American people would blame Congress for making these cuts in unrelated programs; they would not appreciate the argument that Congress is cutting funding for programs *it otherwise supports* because it is trying to punish the President for doing something that is unrelated to those programs. The President, in turn, would use the opportunity to blame Congress, to call the co-equal branch of government "incompetent," and tell the American people that he (the President) cannot be blamed for trying to "get something done" in the face of a "do nothing Congress."

Indeed, trying to cut appropriations for unrelated programs not only fails to solve the problem of faithless execution, it poses an additional disturbing danger: It distorts political accountability. By refusing to faithfully execute the ACA or other laws—unilaterally "softening the blow" of laws by waiving, suspending and altering the law itself—the President forces Congress to resort to drastic, disproportionate means of protecting its constitutional lawmaking prerogative, such as impeachment or cutting appropriations for unrelated programs. And unfortunately, these defensive measures available to Congress are not only disproportionate and untailored to the transgression, but fundamentally fail to solve it. Impeachment and cutting appropriations for unrelated programs does not force a President to faithfully execute the laws. They merely harm the American people and force a gross distortion of political accountability.

Who would the American people blame, in such a scenario? The Congress would point the finger at the President; the President would point the finger at Congress. Stuck in the middle of this inter-branch dispute are the American people, who are left scratching their heads and wondering who is really at fault for this mess.

When a President unilaterally waives, delays or suspends a law such as the ACA, he squelches any opportunity to have a robust, political debate about the workability of the law, and thereby undermines democracy itself. Congress cannot simply "undo" the President's act by repealing the law it wants faithfully executed. Under such circumstances, what Congress wants is what the Constitution entitles it to: faithful execution of the law by the executive branch, so that the American people can make accurate assessments about the law. If the constitutional duty of faithful execution is fulfilled, the law goes into effect as written—both good parts and bad parts—and the American people are fully informed about whether it works, and what may need fixing.

That's the way legislation works: It requires a back-and-forth process of discussion, debate and ultimately, compromise by 535 members of Congress, who represent a diversity of views. When one person—a President—takes it upon himself to assume the power of enacting or amending laws alone, he denies the American people the benefit of such pluralistic, diverse debate, discussion, and compromise. There is a good reason why the founders granted "all" lawmaking power to Congress,[5] and not the unitary Executive: As

[5] *See* U.S. CONST. art. I, § 1 ("All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

history teaches us, it is not wise to entrust the power of lawmaking—and its inherent potential to negatively impact individual liberty—to a single person.

When a law—even a complex and poorly drafted one—is faithfully executed, it enables fully informed consent, and a robust debate in the legislative branch. The American people—as represented by their 535 members of Congress—would understand the shortcomings of the Act quickly and acutely, and would likely call upon their congressional representatives to enact amendments to fix the most egregious problems.

By unilaterally waiving, suspending or delaying the most unworkable, problematic portions of the ACA, the President makes this robust, pluralistic political debate and compromise impossible. Yet it is precisely by having a complex law go into effect *as written* that the political process—democracy itself—can function, and compromises regarding how to fix its problems can be achieved.

Moreover, it is this process—lawmaking by Congress, followed by faithful execution by the President—that allows the American people to know who is to "blame" when problems arise, or are not remedied. By unilaterally taking it upon himself to waive, suspend or delay laws such as the ACA, the President not only fails to faithfully execute the law, he distorts political accountability—and democracy—itself.

Because litigation that satisfies the four-part test inherently would involve a situation in which separation of powers could be preserved only by litigation brought by Congress, the courts would face unusual pressure grant legislative standing. Assuming that any litigation undertaken pursuant to the draft resolution would indeed satisfy the four-part, Congress likely would have an excellent chance of establishing legislative standing and proceeding to the merits of its constitutional claim.

II. THE PRESIDENT'S CONSTITUTIONAL ROLE: A SIX-POINTED STAR

There seems to be a lot of misunderstanding, both in the press and even among some lawyers, about the proper role of the President in our constitutional republic. But the truth is rather simple, and something most of us learned back in grade school civics. When it comes to lawmaking power, the Constitution is unambiguous: Congress possesses "all legislative powers"[6] and the President has a corresponding duty to "take care that the laws be faithfully executed."[7] Under the constitutional architecture, then, the President has no authority whatsoever to amend or write new laws. He must faithfully execute the laws as written by Congress. There is no exception that allows a President to amend or write new laws just because Congress will not enact the laws the President desires, or will not enact laws at all.

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[6] U.S. CONST. art. I, § 1.

[7] U.S. CONST. art. II, § 3. The Take Care Clause is expressed as a presidential duty, using the word "shall" to make clear that faithful execution of the law is not optional: "he shall take care that the laws be faithfully executed." *Id.*

As an initial matter, I feel it is important to dispel one of the biggest canards about the House's contemplated legal action. Specifically, some reporters and pundits seem to insist that legal action against the President is "frivolous" because the number of executive orders issued by the current President is lower than that of some past Presidents.[8] They somehow think this indicates that a lawsuit seeking to define the contours of the President's duty of faithful execution is politically motivated. As just one example, a recent blog post from the *Washington Post* proclaimed that the House "was planning a lawsuit over Barack Obama's use of executive orders," then provided readers with an elaborate bar graph showing the number of executive orders of all Presidents, concluding, "When it comes to executive orders, Obama has so far been a model of executive restraint."[9] This shows a fundamental misunderstanding of executive orders, the scope of presidential power, and the House's contemplated legal action.

Citing the number of executive orders is inappropriate and misleading for two reasons: (1) executive orders are just one species of executive action, and it is the latter—executive action—that should be examined; (2) the *quantity* of executive orders (or any other executive actions) is not relevant in the slightest, as it is the *quality and nature* of executive actions that matters for purposes of assessing their constitutionality.

Examining the number of executive orders is like counting the number of monkeys to gauge whether mammals are aggressive. All monkeys are mammals, but the number of monkeys tells you nothing about the aggressiveness of either monkeys or mammals. It is only by looking at the larger set (mammals) and measuring the incidence of their actual aggressiveness (quality and nature of acts) that one can draw any meaningful conclusions about the aggressiveness of mammals. The same thing goes with executive orders: They are a small subset of executive actions, but their *quantity* says nothing about the overall quality (constitutionality) of either executive orders or the larger set of executive actions.

Perhaps individuals writing such press stories simply don't understand that executive orders are a specific type of executive action that allow the chief executive of a

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[8] *See, e.g.*, Bob Cesca, *GOP Continues Push for Frivolous Obama Lawsuit Despite History of Executive Orders*, THE BLOG, HUFFINGTON POST, July 1, 2014, *available at* http://www.huffingtonpost.com/bob-cesca/gop-obama-executive-orders_b_5546290.html ("Last week, we brought you the story of the latest unprecedented congressional Republican weapon against the White House: the frivolous lawsuit. Specifically, House Speaker John Boehner (R-OH) is considering legal action to overturn the president's executive orders (EOs) in spite of the fact that every president since George Washington has used executive orders to enact policies and implement congressional legislation, among other things. Since then, there have been a lot of tweets, memes and online discussions about how President Obama has issued considerably fewer EOs than nearly every president since the second Grover Cleveland administration, and in fact the absolute *fewest* EOs among all two-term presidents, even if he signs 100 more over the next two years.").

[9] Christopher Ingraham, *Boehner's Attack on Obama's Executive Orders Ignores Presidential History*, Wonkblog, WASH. POST, June 25, 2014, *available at* http://www.washingtonpost.com/blogs/wonkblog/wp/2014/06/25/boehners-attack-on-obamas-executive-orders-ignores-presidential-history/.

governmental entity—the President, in the context of the federal government—to organize the daily housekeeping and functions of the executive branch that the chief executive manages.[10] To be constitutional, executive orders must relate only to the executive branch's proper functioning (including its own independent Article II powers, such as that of Commander in Chief),[11] and cannot infringe on the powers granted by the Constitution to the other branches of government (legislative or judicial).[12]

Some Presidents issue a lot of executive orders; others, few. But the raw number of executive orders is completely irrelevant to an assessment of any particular order's constitutionality. And of course, executive orders are just the tip of executive power iceberg: Presidents can take executive actions in many ways besides executive orders, including the issuance of rules and regulations, memos, prosecuting and withholding prosecution, letters, press releases, and even more recently, blog posts. It is the broader universe of executive actions—not executive orders—that warrants vigilant examination for compliance with the Constitution.

So what executive actions violate the Constitution? In an effort to break down the issue—separate the unconstitutional wheat from the bulk of constitutional chaff—it is useful to think of the President as having six distinct powers, described below. When a President exercises one of these six powers, he is acting in accord with the Constitution and his duty to faithfully execute the laws:

1. *Prosecutorial Discretion*

In executing the laws, courts have recognized that prosecutors generally are allowed discretion regarding what charges to file[13] and how to prioritize numerous cases for prosecution.[14] Prosecutorial discretion does not, however, give the prosecutor—an executive branch official—the authority to suspend a law with regard to an entire category of individuals, whom Congress has not seen fit to exempt from the law. A law that declares

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[10] A quick perusal of the current President's executive orders, for example, shows that they are mostly routine executive matters such as foreign affairs, government contracting, and establishing various advisory councils. A full list of executive orders is available online at http://www.whitehouse.gov/briefing-room/presidential-actions/executive-orders?page=1. The House lawsuit would, of course, not target any such routine executive orders that are consonant with executive power and hence, the Constitution's separation of powers.

[11] The constitutional authority for executive orders emanates from Article II, section 1 of the Constitution that declares, "The executive power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1. They may also emanate from the other powers granted to the President in the text of the Constitution, such as the power as Commander in Chief of the armed forces. *Id.* at art. II, § 2.

[12] *See, e.g.,* Youngstown Sheet & Tube Co. v. Sawyer, 343 US 579 (1952) (invalidating President Truman's Executive Order placing all domestic steel mills under federal control to further the Korean War effort).

[13] *See* U.S. v. Batchelder, 442 U.S. 114, 124 (1979) ("Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion.").

[14] Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.").

individuals who commit X "shall" be subject to punishment, is to be exercised subject to prosecutorial discretion, and prosecutorial discretion permits such individuals to escape punishment only when the prosecutor makes his decision on a case-by-case basis. To put it another way, prosecutorial discretion is a doctrine that allows prosecutors *retail* discretion regarding how and whether to charge an individual with an applicable crime(s); it does not permit a prosecutor to exempt categories of individuals *wholesale* from an otherwise applicable law.

As the draft resolution targets the execution of the ACA's broad regulatory commands, it does not appear—whatever the contours of prosecutorial discretion—that such discretion has anything to do with the President's decision to suspend his execution of these regulatory requirements. Indeed, prosecutorial discretion has not been cited by the Administration as a justification for the delay, waiver or suspension of this particular law. As such, the executive's prosecutorial discretion does not seem relevant to consideration of the proposed resolution.

2. *Independent Article II powers*

Under Article II of the Constitution, the President has powers that he may exercise "independent" of Congress, including, most notably, his power as Commander in Chief of the armed forces.[15] Within his realm of independent constitutional authority, the President can take actions that he believes do not require congressional approval.

The President's independent Article II authority as Commander in Chief has been the basis of numerous executive actions by which the President has refused to abide by statutes written by Congress. The ongoing dispute about the constitutionality of the War Powers Resolution is one prominent example. Since congressional enactment of the War Powers Resolution in 1973, over President Nixon's veto, every President has taken the position that the resolution unconstitutionally infringes upon the President's authority as Commander in Chief.[16]

Other examples include several signing statements of President George W. Bush that expressed his view of a "unitary executive," disallowing any acts of Congress that infringed his exclusive power as Commander in Chief.[17] President Barack Obama has continued this

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[15] U.S. CONST. art. II, § 2 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual operation of the United States . . . .").

[16] Richard F. Grimmett, *War Powers Resolution: Presidential Compliance*, Congressional Research Service, Sept. 25, 2012, at p. 2, *available at* http://fas.org/sgp/crs/natsec/RL33532.pdf.

[17] *See, e.g.*, Statement on Signing the National Defense Authorization Act for Fiscal Year 2004 (November 24, 2003), *available at* http://www.presidency.ucsb.edu/ws/?pid=865 ("The executive branch shall construe the restrictions on deployment and use of the Armed Forces in sections 541(a) and 1023 [of the NDAA] as advisory in nature, so that the provisions are consistent with the President's constitutional authority as Commander in Chief and to supervise the unitary executive branch.").

view, issuing several signing statements objecting to statutes based upon his belief that they infringe his exclusive power as Commander in Chief.[18]

As the draft resolution being considered targets the ACA, there would be no basis for claiming presidential independent authority to disregard this domestic law that is an expression of Congress's exclusive power to tax.[19]

3. *Impossibility*

Courts have recognized two related, but quite limited, exceptions to the general rule that an executive agency cannot depart from the unambiguous requirements of a statute: (1) the absurd results doctrine; (2) the administrative necessity, or impossibility, doctrine.

The absurd results doctrine applies where the literal application of a statute will produce a result demonstrably at odds with the intentions of the drafters, in which case the intention of the drafters, rather than the strict language controls.[20] The administrative necessity doctrine authorizes an agency to depart from literal statutory requirements if those requirements are impossible to administer. Under the impossibility doctrine, the agency can adjust the requirements so as to make them susceptible to administration.

One area of administrative impossibility relates specifically to the executive's failure to comply with timelines provided in a statute. Generally, the executive's failure to comply with a statutory deadline triggers a claim for relief under the Administrative Procedure Act (APA), which states that courts shall "compel agency action unlawfully withheld or unreasonably delayed."[21] When an agency fails to comply with an explicit statutory deadline, courts generally are willing to compel compliance with the statutory deadline. The Supreme Court, for example, in *Norton v. Southern Utah Wilderness Alliance*, ruled that

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18 *See, e.g.*, Statement by the President on H.R. 3304, the "National Defense Authorization Act for Fiscal Year 2014," *available at* http://www.whitehouse.gov/the-press-office/2013/12/26/statement-president-hr-3304 ("For the past several years, the Congress has enacted unwarranted and burdensome restrictions that have impeded my ability to transfer detainees from Guantanamo. . . . Section 1035 [of the NDAA] does not, however, eliminate all of the unwarranted limitations on foreign transfers and, in certain circumstances, would violate constitutional separation of powers principles. The executive branch must have the flexibility, among other things, to act swiftly in conducting negotiations with foreign countries regarding the circumstances of detainee transfers."). President Obama's constitutional objection to this provision of the NDAA was one of the bases initially cited by the White House in its decision not to comply with the statute's notice requirement before authorizing the transfer of the "Gitmo 5" out of Guantanamo, in exchange for the release of Army Sergeant Bowe Berghdal. *See* Jack Goldsmith*, The President Pretty Clearly Disregarded a Congressional Statute in Swapping GTMO Detainees for Bergdahl***,** LAWFARE.COM, June 2, 2014, *available at* http://www.lawfareblog.com/2014/06/the-president-pretty-clearly-disregarded-a-congressional-statute-in-swapping-gtmo-detainees-for-bergdahl/.

19 *See* U.S. CONST., art. I, § 8. *See also* NFIB v. Sebelius, 132 S. Ct. 2566 (U.S. 2012) (upholding the constitutionality of the ACA as an exercise of congressional taxing power).

20 *See* United States v. Ron Pair Enterprises, Inc.*,* 489 U.S. 235, 242 (1989).

21 5 U.S.C. § 706(1).

"when an agency is compelled by law to act within a certain time period . . . a court can compel the agency to act . . . ."[22]

More specifically, several U.S. courts of appeal have addressed an agency's ability to ignore statutorily specified deadlines under the APA, with two circuits—the Ninth and Tenth—ruling that agencies have no discretion at all to ignore such statutory deadlines. The D.C. Circuit, by contrast, does not adopt such a black-and-white rule, preferring to assess the legality of executive disregard of statutory timelines using a multi-factor test.

A. The Ninth & Tenth Circuit's Per Se Rule Enforcing Statutory Timelines

The Tenth Circuit, in *Forest Guardians v. Babbitt*,[23] was asked to determine the legality, under the APA, of the Secretary of Interior's failure to abide by a specific statutory timeline for designation of a critical habitat for the silvery minnow under the Endangered Species Act. The Secretary argued that compliance with the statutory deadline was impossible, given the limited resources of the Department of the Interior, and the relatively low priority of designating critical habitat for species that were already endangered.[24] The Tenth Circuit rejected the Secretary's excuse for non-compliance with the statutory deadline, reasoning that "shall" means "shall" under the law, and "when a statute uses the word 'shall,' Congress has imposed a mandatory duty upon the subject of the command."[25]

The Ninth Circuit has embraced a similar approach to statutory deadlines. In *Biodiversity Legal Foundation v. Badgley*,[26] several environmental groups and individuals sued the Secretary of the Department of the Interior and the Regional Director of the U.S. Fish and Wildlife Service, seeking equitable relief based upon defendants' failure to comply with statutory deadlines regarding the listing of the Spalding's Catchfly, Mountain Yellow-Legged Frog, Great Basin Redband Trout and Yellow-Billed Cuckoo as endangered species under the Endangered Species Act. The Ninth Circuit ruled that courts "must reject those constructions [of a statute] that are contrary to clear congressional intent or that frustrate the policy Congress sought to implement."[27] Because the Endangered Species Act provided a "firm twelve-month deadline for making final determinations,"[28] the court concluded that "Congress intended to limit the flexible deadline governing the initial listing determination by enacting the firm deadline for making the final determination."[29] Accordingly, the Fish

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[22] 542 U.S. 55 , 65 (2004).

[23] 174 F.3d 1178 (10th Cir. 1999).

[24] *Id.* at 1183.

[25] *Id.* at 1187.

[26] 309 F.3d 1166 (9th Cir. 2002).

[27] *Id.* at 1175.

[28] *Id.*

[29] *Id.* at 1176.

and Wildlife Service's failure to comply with the statutorily specified timeline compelled the court to grant injunctive relief for plaintiffs.[30]

B. The D.C. Circuit's Multi-Factor "TRAC" Test for Enforcing Statutory Timelines

In 1984, the D.C. Circuit decided *Telecommunications Research and Action Center (TRAC) v. FCC*,[31] a case brought by several non-profit organizations and public interest groups that sought to compel the FCC to resolve certain matters pending before the agency. The plaintiffs asserted that the FCC had unreasonably delayed decision making, in violation of the APA's general command that agencies conclude matters presented to them "within a reasonable time."[32] Specifically, the FCC had delayed, for more than five years, making decisions on ratepayers' entitlement to allegedly unlawful overcharges by AT&T.[33]

Unlike the Ninth and Tenth Circuit cases discussed in the previous subsection, *TRAC* did not involve a specific statutory deadline; instead, the case was pursued as one of "unreasonable delay." In such a situation—not involving a specific statutory timeframe—the D.C. Circuit in *TRAC* adopted a six-part multi-factor balancing test for determining whether the agency's delay is "unreasonable" and thus warranting mandamus relief:

> (1) the time agencies take to make decisions must be governed by a "rule of reason";
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> (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed, that statutory scheme may supply content for this rule of reason;
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> (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake;
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> (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority;
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> (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and
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> (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.[34]

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[30] *Id.* at 1178.

[31] 750 F.2d 70 (D.C. Cir. 1984).

[32] *Id.* at 76, 79 (citing 5 U.S.C. § 555(b) (1982)).

[33] *Id.* at 80-81.

[34] *See id.* at 80.

The *TRAC* court concluded that because the FCC had assured the court that it was "moving expeditiously on both overcharge claims" it "need not test the delay here against the [6-factor] standard to determine if it is egregious enough to warrant mandamus."[35] The court then retained jurisdiction over the case and required the FCC to inform the court within 30 days of the dates by which it anticipated resolution of the refund disputes.[36]

The D.C. Circuit subsequently extended the *TRAC* 6-part analysis to instances of agency non-compliance with statutorily specified timelines. Specifically, in *In re Barr Laboratories*,[37] the court was asked to consider the propriety of mandamus relief sought by a generic drug manufacturer whose generic drug applications were not processed within a 180-day deadline specified by Congress.[38]

The issue, according to the *Barr Laboratories* court, was "not whether the FDA's sluggishness has violated a statutory mandate—it has—but whether we should exercise our equitable powers to enforce the deadline."[39] The court characterized the *TRAC* 6-part analysis as appropriate for all requests for mandamus against a claim of agency delay, regardless of whether the delay violated a specific statutory timeline. This conclusion—that the *TRAC* 6-part analysis applies to any claim of mandamus relief—seems supported by *TRAC* factor two, which states that "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 [the] rule of reason."[40]

While Congress had, indeed, provided an explicit 180-day timetable for FDA approval of generic drug applications, the *Barr Laboratories* court concluded, "Here we may assume that Congress's 180-day deadline indeed supplies content for item one's 'rule of reason,' but a finding that delay is unreasonable does not, alone, justify judicial intervention."[41] The court then struggled with application of the third factor—whether the delay should be characterized as one in the sphere of economic regulation versus health and welfare—but ultimately punted on this issue, concluding this factor was "largely irrelevant in light of *TRAC's* fourth consideration—the effect of relief on competing agency activities."[42]

The *Barr Laboratories* court assumed that FDA officials had not delayed approving Barr's generic drug applications because they were "twiddl[ing] their thumbs" but because the agency did not have sufficient resources to process all the applications within the

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[35] *Id.*

[36] *Id.* at 8

[37] 930 F.2d 72 (D.C. Cir. 1991).

[38] *Id.* at 74.

[39] *Id.*

[40] *TRAC*, 750 F.2d at 80.

[41] *Barr Laboratories*, 930 F.2d at 75.

[42] *Id.*

statutorily specified deadline.[43] It concluded that the court had "no basis for reordering agency priorities" and that "[w]hile Congress clearly intended a faster track for generic drug applications in general, it did not choose a super-priority for Barr, and it did not address the trade-off between strict compliance with the 180-day deadline and the FDA's disposition of its other projects with enough clarity to guide judicial intervention."[44] As such, the court did not believe that it should use its equitable power to mandate FDA compliance with the 180-day timeline.

The D.C. Circuit's approach in *Barr Laboratories* makes it clear that any agency delay—even delay that violates explicit statutory deadlines—will be subject to the *TRAC* 6-part analysis, thus eschewing the *per se* approach to enforcing statutorily specified timelines adopted by the Ninth and Tenth Circuits. Nonetheless, *TRAC* itself acknowledges that the existence of a statutorily specified timeline is to be given consideration as supplying the necessary "rule of reason" for assessing the reasonableness of agency delay under an APA claim. The gloss provided by *Barr Laboratories*, however, seems to be that if a court believes an agency simply does not have the resources to abide by a statutorily specified deadline—essentially, a type of impossibility—it will defer to the agency's prioritization of its limited resources.

In all cases, however—whether in a *per se* jurisdiction such as the Ninth and Tenth Circuits or a multi-factor jurisdiction such as the D.C. Circuit—statutorily-specified timelines appear to be a substantial factor in assessing the reasonableness of agency delay under the APA. If Congress provides a specific timeline for action, courts are generally willing to enforce those deadlines, absent convincing evidence, such as in *Barr Laboratories*, that the agency cannot comply with the timeline due to limited resources or other similar impossibility. Moreover, as the *TRAC* 6-part analysis itself suggests, agency delay that impacts the public's health and welfare will be subject to more searching judicial scrutiny.

Whether or to what extent any of these analytical approaches to agency delay would apply outside the context of an APA unreasonable delay claim, or even outside the context of a writ of mandamus, is unclear. It may well be, for example, that a *constitutional* claim grounded in executive non-compliance with a specific statutory deadline may be assessed quite differently, using standards defining the contours of the President's duty of faithful execution instead. This would seem to be a reasonable conclusion, since the constitutional dimensions of the duty to faithfully execute are not coextensive with the obligations of administrative agencies subject to the commands of the APA.

4. <u>*Gap filling for ambiguous laws written by Congress*</u>

When Congress has written an unambiguous law, the executive's constitutional duty is to faithfully execute that law. When Congress enacts a law that is ambiguous, however, the executive branch, in fulfilling his duty of faithful execution, may clarify those ambiguities

[43] *Id.*

[44] *Id.* at 76.

and fill any statutory gaps, consistent with congressional intent, and the agency's expert determination as to how to fill those gaps and clarify those ambiguities in a statute is entitled to judicial deference. This deference, known as *Chevron* deference, was first articulated in the 1984 Supreme Court decision, *Chevron v. Natural Resources Defense Council.*[45] In *Chevron*, the Court declared:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.
>
> "The power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." Morton v. Ruiz, 415 U.S. 199, 231, 94 S.Ct. 1055, 1072, 39 L.Ed.2d 270 (1974).[46]

The *Chevron* framework recognizes that Congress is in charge of lawmaking: If Congress writes a vaguely worded statute or (inevitably) passes a law that has gaps that need to be filled, the power to clarify the ambiguity and fill the gaps is entrusted to, explicitly or implicitly, the executive branch. This is a broad delegation of power, indeed, but consonant with the executive's duty of faithful execution of the laws. Congress could deny the executive branch this power by writing clearer and tighter statutes, or it could even pass a subsequent statute reversing the executive's clarification or gap filling. Either way, Congress has power to control the enactment of its own laws and their subsequent implementation, and the executive branch acts constitutionally when, in the course of executing the law, it provides a faithful interpretation of congressional intent via rulemaking.

Because administrative agencies must sometimes ineluctably fill gaps and clarify ambiguities in statutes, their doing so is consonant with the duty of faithful execution and would not be an appropriate focus of a lawsuit asserting a failure of faithful execution or separation of powers. If Congress believes that the executive branch is becoming too aggressive in its gap-filling role, there are proportionate, tailored remedies available such as repealing the executive's rule by subsequent statute, writing statutes that deny rulemaking for certain areas altogether, or enacting appropriation riders that prohibit agencies from spending money on certain regulatory activities.

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[45] 467 U.S. 837 (1984)

[46] *Id*. at 843-44 (footnotes omitted).

[Congress cannot intervene in this type of litigation! It can only file amicus briefs.]

Under the draft resolution, the salience of the executive branch's gap-filling power and entitlement to corresponding *Chevron* deference would be dependent on which provision(s) of the ACA are challenged. If the House selects a provision of the ACA that sets forth an unambiguous command, the executive's duty would be to implement that unambiguous command, and no deference would be owed to any executive actions to the contrary. This analytical rubric was recently reiterated by the Supreme Court in the *Utility Air Regulatory Group v. EPA* decision, which will be discussed in detail in the next section.

5. *Waiver authority expressly delegated to the President by Congress*

Consistent with number four above (regarding the executive's power to fill gaps and clarify statutory ambiguities), courts have long recognized that when Congress passes a law granting an executive official the authority to waive certain provisions of its laws, an executive official who subsequently exercises such waiver authority is acting constitutionally, and faithfully executing the law written by Congress.[47] Sometimes the waiver authority granted by Congress in a given statute is carefully cabined, and guided by specific factors outlined in the statute itself. Other times, Congress passes a statute that grants virtually limitless discretion to an executive officer to waive certain provisions of a statute.[48]

While some assert[49] that existing case law goes too far in allowing Congress to delegate lawmaking authority to the executive branch,[50] the bottom line—whatever one thinks of the propriety of the scope or application of delegation or deference to agency rulemaking—is that statutory waiver provisions, whether broad or narrow, are ultimately within the control of Congress. Congress is never forced to enact a waiver provision, and it should be circumscribed in the use and drafting of waiver provisions when it does not wish to delegate too much authority to the executive branch.

Because the exercise of waiver authority has its genesis in explicit congressional delegation of power to the executive, it would be ill-advised for Congress to try to frame an exercise of waiver authority as a failure to faithfully execute the laws, unless the waiver granted was unambiguously outside the scope of the waiver authority granted by Congress. If the waiver provision is narrowly cabined, for example, and the executive waiver granted went

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[47] *See generally* Richard A. Epstein, *Government by Waiver*, 7 NAT'L AFFAIRS 39 (2011); David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUMBIA L. REV. 265 (2013).

[48] David J.Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 Columbia L. Rev. 265, 276-90 (2013) (discussing the difference between a "little waiver" and a "big waiver," and providing examples).

[49] *See* CATO HANDBOOK FOR POLICYMAKERS 83-90 (7th ed. 2009), *available at* http://object.cato.org/sites/cato.org/files/serials/files/cato-handbook-policymakers/2009/9/hb111-7.pdf.

[50] *See* Mistretta v. U.S., 488 U.S. 361, 372 (1989) (citing J.W. Hampton, Jr. & Co. v. U.S., 276 U.S. 394, 406 (1928)) (congressional delegation of legislative authority is an implied power of Congress that is constitutional so long as Congress provides an "intelligible principle" to guide the executive branch).

well beyond the cabining principle provided, a failure to faithfully execute claim could conceivably be successfully made. Nonetheless, given the ambiguity inherent in most waiver provisions, they are generally unsuitable for challenges based on a failure to faithfully execute.

6. *Refusing to Defend a law the President believes is unconstitutional*

The President is constitutionally required to take an oath of office: "I do solemnly swear (or affirm) that I will faithfully execute the Office of the President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States."[51] In taking this oath, the President pledges to defend the Constitution—the supreme law of the land[52]-- and his duty to the Constitution supersedes his obligation to enforce ordinary statutes when they conflict with the Constitution. The President, in other words, has an independent duty, based on his oath of office, to only use his constitutional power in ways that are consonant with the Constitution itself.

Numerous Presidents—of all political persuasions—have accordingly refused to defend laws in court when they believed the statutes were unconstitutional. In *Morrison v. Olsen*,[53] for example, the Supreme Court upheld the federal independent counsel statute against a constitutional attack, despite the fact that the Reagan Administration's Solicitor General appeared as amicus, arguing that the law was unconstitutional.[54] Similarly, in *Metro Broadcasting v. FCC*,[55] President George H.W. Bush's Solicitor General filed an amicus brief arguing that the FCC's policy granting preferences in FCC licenses to minority-owned businesses was unconstitutional.[56] And most recently, the Obama Administration refused to defend the constitutionality of the Defense of Marriage Act (DOMA) before the Supreme Court, causing the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives to step in and defend DOMA.[57]

In the specific case of the ACA, which is the target of the draft resolution, there has been no argument by the President that the ACA is unconstitutional. Indeed, the President

[51] U.S. CONST. art. II, § 1.

[52] U.S. CONST. art. IV. ("This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land . . . .").

[53] 487 U.S. 654 (1988).

[54] Brief for the United States as Amicus Curiae Supporting Appellees, Morrison v. Olson, 1988 WL 1031600 (U.S.) (Appellate Brief).

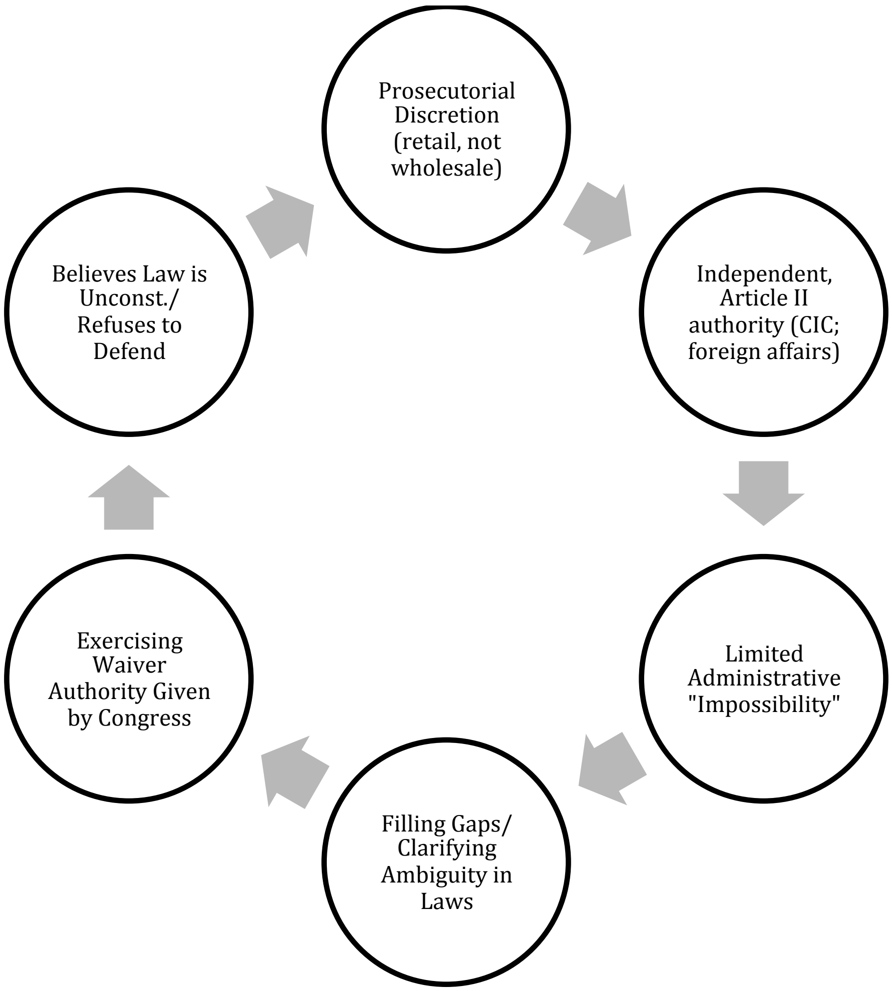
[55] 497 U.S. 547 (1990).

[56] Brief for the United States as Amicus Curiae Supporting Petitioner, Metro Broadcasting, Inc. v. FCC, 1989 WL 1126975 (U.S.) (Appellate Brief).

[57] United States v. Windsor, 133 S. Ct. 2675, 2683-84 (U.S. 2013).

vigorously defended the ACA's constitutionality, which was sustained by the Supreme Court as an exercise of Congress's taxing power in *NFIB v. Sebelius*.[58]

To summarize, these six powers of the executive branch can be conceptualized as a six-pointed star:



It is important to notice what is missing from this six-pointed star of executive power: The executive does *not* have the power to nullify (contradict) an unambiguous law written by Congress, as the Supreme Court recently reiterated in *Utility Air Regulatory Group v. EPA*, a case that will be examined in detail in the next section.

If the House adopts the resolution being considered, its litigation will focus precisely on this discrete area of unconstitutional behavior, when a President takes an executive action that directly contravenes, or nullifies, an unambiguously written law—in this case, the ACA.

[58] 132 S. Ct. 2566 (U.S. 2012).

Presidential nullification not only establishes standing to litigate Congress's institutional injury, but it also helps prove the merits of the claim that the President has failed to faithfully execute Congress's law and thus violated separation of powers. The contours of a President's duty of faithful execution are, substantively, relatively undeveloped by case law because Presidents have rarely attempted to directly contradict (nullify) an unambiguously written law. When Presidents claim such novel power, however, Congress should be willing to vindicate its constitutional lawmaking prerogative through targeted litigation, and as *Utility Air Regulatory Group* shows, the courts should be willing to strike such executive actions down as violating separation of powers.

III. RECENT CASE LAW OF RELEVANCE TO THE DRAFT RESOLUTION

There is a good deal of overlap between: (1) the issue of legislator standing in an institutional injury lawsuit, and (2) the merits of a failure to faithfully execute claim. In both instances, the plaintiff-legislators must prove that the President has taken some action that is tantamount to a nullification of a law the legislature enacted. Such a nullification establishes the injury-in-fact necessary to establish an active "case" or "controversy" under Article III, section two (and thus, standing), but it is also relevant to establishing that the President has failed to faithfully execute the law.

There are two recent cases that are important for assessing whether nullification has occurred, and how the courts will assess the merits of separation of powers disputes between Congress and the executive branch: (1) *Utility Air Regulatory Group v. EPA* (U.S. 2014) and (2) *Kerr v. Hickenlooper* (10th Cir. 2014).

A. Utility Air Regulatory Group (UARG) v. EPA

On June 23, 2014, the Supreme Court decided *Utility Air Regulatory Group v. EPA*,[59] a case initiated by states and industry groups who challenged the constitutionality of the EPA's carbon emissions "tailoring rule" promulgated under the auspices of the Clean Air Act. Under the relevant provisions of the Act, sources with the potential to emit more than 100 tons per year of certain pollutants are required to obtain an EPA permit. Despite this specific statutory threshold for determining who is subjected to permitting, the EPA's tailoring rule wrote a new, much higher threshold of 100,000 tons of emissions for greenhouse gases.[60]

The EPA argued that its tailoring rule was an appropriate exercise of its "discretion," and thus entitled to *Chevron* deference. [61] The Supreme Court rejected this argument, concluding, "We conclude that EPA's rewriting of the statutory thresholds was impermissible . . . . An agency has no power to 'tailor' legislation to bureaucratic policy

[59] 134 S. Ct. 2427 (2014).

[60] *Id.* at 2444-45.

[61] *Id.* at 2442.

goals by rewriting unambiguous statutory terms. Agencies exercise discretion only in the interstices created by statutory silence or ambiguity; they must always 'give effect to the unambiguously expressed intent of Congress.' It is hard to imagine a statutory term less ambiguous than the precise numerical thresholds at which the Act requires PSD and Title V permitting. When EPA replaced those numbers with others of its own choosing, it went well beyond the 'bounds of its statutory authority.' "[62]

The tailoring rule, furthermore, could not be justified an exercise of "enforcement discretion," because it was "not just an announcement of EPA's refusal to enforce the statutory permitting requirements; it purport[ed] to *alter* those requirements and to establish with the force of law that otherwise-prohibited conduct will not violate the Act."[63] Relatedly, the EPA's suggestion that the tailoring rule was a reasonable response to resource constraints was rejected, with the Court declaring that the law does not "authorize[] an agency to modify unambiguous requirements imposed by a federal statute. An agency confronting resource constraints may change its own conduct, but it cannot change the law."[64]

The *UARG* Court "reaffirm[ed] the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate."[65] In the face of unambiguous statutory language, the executive's constitutional duty is to faithfully execute the law as Congress has instructed; it cannot alter or suspend the law to suit its own needs. The Court concluded that "[w]ere we to recognize the authority claimed by EPA in the Tailoring Rule, we would deal a severe blow to the Constitution's separation of powers. Under our system of government, Congress makes laws and the President, acting at times through agencies like EPA, "faithfully execute[s]" them. The power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law's administration. But it does not include a power to revise clear statutory terms that turn out not to work in practice."[66]

The import of *UARG* for potential House litigation pursuant to the draft resolution is significant. *UARG* reaffirmed the core principle of separation of powers—that it is Congress's sole prerogative to write the laws, and the executive's constitutional obligation to faithfully execute those laws. When Congress provides ambiguous statutory language, the executive may fill those ambiguous gaps with the exercise of reasonable discretion consistent with overall congressional intent. But when Congress's statutory instructions are unambiguous, the executive must implement the provision(s) as written, and claims of enforcement "discretion" will not enable the executive to avoid its obligation of faithful execution.

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[62] *Id.* at 2445 (internal citations omitted).

[63] *Id.* (emphasis in original).

[64] *Id.* at 2446.

[65] *Id.*

[66] *Id.* (internal citations omitted).

UARG thus reinforces my view that the House is best advised to litigate the constitutionality of executive actions relating to the ACA in which such actions appear to run contrary to unambiguous language within the ACA itself.

B. *Kerr v. Hickenlooper*

Since the time of my testimony before the House Judiciary Committee, an important federal court decision specifically addressing legislator standing to assert an institutional injury was reached by the U.S. Court of Appeals for the Tenth Circuit, *Kerr v. Hickenlooper*.[67] In *Kerr*, a group of five Colorado state legislators—all Democrats—filed a lawsuit against the executive of their state, Governor John Hickenlooper.

In their complaint, the plaintiff-legislators asserted that a state constitutional amendment, the Taxpayer Bill of Rights (TABOR), violated various provisions of federal and state constitutional law.[68] Governor Hickenlooper filed a motion to dismiss, asserting that the plaintiffs lacked standing.[69] The Tenth Circuit panel—consisting entirely of judges appointed by Democrat Presidents—unanimously concluded that the plaintiff-legislators had standing.[70]

The plaintiff-legislators in *Kerr* alleged that the injury-in-fact they suffered—a constitutional prerequisite to standing—was TABOR's deprivation of "legislative core functions of taxation and appropriation."[71] Specifically, the legislators asserted that because TABOR required any tax increases to be approved by Colorado voters by referendum, it disempowered the legislature with regard to its power to tax and spend.[72]

The Tenth Circuit surveyed the Supreme Court's two institutional injury legislative standing cases—*Coleman v. Miller*[73] and *Raines v. Byrd*[74]—and concluded that neither case squarely fit the facts before it, but that the plaintiff-legislators injury-in-fact allegations

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[67] 744 F.3d 1156 (10th Cir. 2014).

[68] *Id.* at 1161 ("They [plaintiffs[claim that the so-called Taxpayer's Bill of Rights, TABOR, violates the Guarantee Clause of the federal Constitution, is in direct conflict with provisions of the Enabling Act, and impermissibly amends the Colorado Constitution.").

[69] *Id.*

[70] *Id.* at 1171.

[71] *Id.* at 1163.

[72] *Id.* at 1169 ("Legislator-plaintiffs contend they have been injured because they are denied the authority to legislate with respect to taxing and spending increases. They cannot point to a specific act that would have resulted in a tax increase because any revenue-raising bill passed by both houses of the General Assembly and signed by the governor, instead of becoming law, would merely be placed on the ballot at the next election. In other words, the legislator-plaintiffs' injury is their disempowerment rather than the failure of any specific tax increase.").

[73] 59 U.S. 972 (1939).

[74] 521 U.S. 811 (1997).

"f[e]ll closer to the theory of vote nullification espoused in *Coleman* than to the abstract dilution theory rejected in *Raines*."[75] While the plaintiff-legislators in *Kerr* did not sue based upon the nullification of any specific, single vote (as was the case, for example in *Coleman v. Miller*), the court did not believe this was fatal to establishing constitutional injury-in-fact, concluding "[I]t would be a bizarre result if the nullification of a single vote supported legislative standing [as in *Coleman*], but the nullification of a legislator's authority to cast a large number of votes [on tax increases] did not."[76]

The *Kerr* court also applied two of the prudential standing factors relevant to institutional injury legislative standing: explicit legislative authorization and the availability of political self-help. Regarding the prudential factor of explicit legislative authorization, the Court suggested that such authorization was satisfied, stating, "Notably, the Colorado General Assembly, through its Committee on Legal Services, has chosen to participate as an amicus curiae in favor of legislative standing in this appeal. The General Assembly's participation further distinguishes this case from *Raines*, in which the Court 'attach[ed] some importance to the fact that appellees ha[d] not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose[d] their suit.'"[77] While no portion of the Colorado General Assembly explicitly authorized the five plaintiff-legislators to initiate litigation, the filing of an amicus brief supporting the plaintiff-legislators' standing by the Committee on Legal Services was considered by *Kerr* to be an important fact supporting legislative standing.

Regarding the prudential standing factor of political self-help availability, the *Kerr* court concluded that because TABOR was a state constitutional amendment, it could not be repealed by a simple majority vote of the Colorado General Assembly, but instead would have to be approved by a majority of Colorado voters via referendum or the calling of a state constitutional convention.[78] Accordingly, the Colorado legislator-plaintiffs could not "undo its [TABOR's] provisions pursuant to the normal legislative process."[79]

The *Kerr* court concluded that the legislator-plaintiffs "have sufficiently alleged an injury to the plain, direct and adequate interest in maintaining the effectiveness of their votes, rather than relying on an abstract dilution of institutional legislative power."[80] Because TABOR broadly nullified the legislative power to tax—giving it to Colorado voters instead—the plaintiff-legislators had sufficiently pled an injury-in-fact analogous to the nullification of legislative power recognized by the Supreme Court in *Coleman*. While such a broad

[75] *Id.* at 1165.

[76] *Id.* at 1170.

[77] *Id.* at 1168 (quoting *Raines v. Byrd*, 521 U.S. at 829). It should be noted that the Colorado General Assembly's Committee on Legal Services is similar to the House Bipartisan Advisory Legal Group, in that it consists of a group of ten Colorado legislators, and is dominated by the majority political party. *See* COLO. REV. STAT. § 2-3-502 (2013).

[78] *Id.* at 1166.

[79] *Id.* (internal quotations omitted).

[80] *Id.* at 1171 (internal citations and quotation marks omitted).

nullification of power could be characterized as an "abstract dilution of institutional legislative power" analogous to the broad loss of legislative power caused by the Line Item Veto Act (that was insufficient for legislative standing in *Raines*), the Tenth Circuit believed that TABOR's deprivation of legislative power over taxation, while admittedly broad, was sufficiently concrete to establish institutional injury-in-fact.

Under the draft resolution being considered by the Committee, *Kerr* suggests that at the stage of a motion to dismiss for want of standing under Rule 12(b)(1) of the Federal Rules of Civil Procedure, a well-pleaded complaint that carefully alleges a broad nullification of legislative power will be assumed as true (as is normally the case at the motion to dismiss stage),[81] and institutional injury-in-fact will be found.[82] Indeed, the draft resolution features a stronger version of institutional authorization than was the case in Kerr and, as described earlier in my testimony, the House lawsuit being contemplated over the President's suspensions of ACA involves an equally compelling lack of available political self-help.

IV. CONCLUSION

As the above discussion shows, a well-crafted, narrowly-tailored lawsuit by the House of Representatives satisfying the four-part test, laid out in my February 26, 2014, House Judiciary Committee testimony, would stand an excellent chance of establishing standing. While courts have been cautious in their approach to legislative standing, they have not prohibited it. Indeed, as numerous cases show, gaining legislative standing to cure an institutional injury is not uncommon. What is important to courts is that legislators bringing the lawsuit can articulate some executive action that has nullified either a specific legislative act or a particular kind of legislative power. Once such injury-in-fact is shown, prudential factors such as explicit legislative authorization for the lawsuit (or at least formal support therefore, as was the situation in *Kerr*), the unavailability of properly tailored and effective self-help, and the lack of an available private plaintiff will be considered important "plus factors" that encourage courts to allow standing.

Assuming that a lawsuit authorized pursuant to the draft resolution would satisfy the four-part test, any claims of a failure to faithfully execute the laws would stand an excellent chance of success on the merits, particularly if, as in *Utility Air Regulatory Group*, the lawsuit is tailored to address executive actions that are contrary to unambiguous statutory instructions provided by Congress. At a minimum, the President's constitutional duty to faithfully execute the laws must mean that he cannot take executive action that directly contradicts an unambiguous statutory provision.

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[81] *See* Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955 (2007).

[82] *Id.* ("On remand [to consideration of claims on the merits], plaintiffs will be required to prove their allegations. But at this stage [a motion to dismiss for want of standing], assuming the truth of all well-pled allegations contained in the complaint, we conclude that the legislator-plaintiffs have satisfied *Coleman's* requirements for legislative standing.").

Appendix A:

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 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 documents why this President's actions are qualitatively different from his predecessors and thus raises 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 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]

[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).

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 rebuttal presumption against adjudicating legislator lawsuits. 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.

II. INSTITUTIONAL INJURY

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

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[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.*

> *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 about 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 an institution?

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 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]

[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.").

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]

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]

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[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 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,

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.

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

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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.

dispute 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.

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.*

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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.

[19] *Id.* at 438.

[20] *Id.*

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

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 a large category of illegal immigrants may obtain deferral of deportation and obtain employment authorization to remain in the country indefinitely.[24] Imagine further 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?

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]

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[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.

[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 Assembly.. The allegations

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

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-

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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.").

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

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.

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.

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[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.

[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).

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 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.

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[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.").

[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.

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 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]

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

[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).

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 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

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

[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.

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 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 resignation 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

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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).

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 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

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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).

the political branches.[68] She rejected the 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.

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[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 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.*

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 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 insists 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 branches, and instead simply resolve the underlying issue in a more traditional, private citizen vs.

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[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).

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 the need 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 an 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 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

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

[84] *Id.* at 827.

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

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

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. 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.

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[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.

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

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]

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

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[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 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).

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] 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

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[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 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.

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 "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]

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[101] *Id.* at 829-30 ("Whether the case would be 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 broad 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 be 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.").

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

[106] *Id.* at 23.

[107] *Id.*

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 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 memo: (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]

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

[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).

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]

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.

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[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 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 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]

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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 bring 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.").

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

118 *Id.*

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 of 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.

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 despite 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 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?

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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.

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.