Written Statement

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"Authorization to Initiate Litigation for Actions by the President Inconsistent with His Duties Under the Constitution of The United States"

Committee on Rules
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Chairman Sessions, Ranking Member Slaughter, and Members of the Rules Committee, my name is Jonathan Turley and I am a law professor at George Washington University where I hold the J. B. and Maurice C. Shapiro Chair of Public Interest Law. It is an honor to appear before you today to discuss the possible lawsuit on behalf of the House of Representatives to challenge actions taken by President Obama in violation of the Separation of Powers.

Today's hearing is a historic step to address the growing crisis in our constitutional system – a shifting of the balance of power within our tripartite system in favor of a now dominant Executive Branch. While both Congress and the courts have lost authority over the decades, the Legislative Branch has lost the most with the rise of a type of über-presidency. I do not believe that our President has either the desire for or the inclination to exercise tyrannical authority. It is not his motivations but his means that are troubling. Our system is changing in a dangerous and destabilizing way. We are seeing the emergence of a different model of government in our country – a model long ago rejected by the Framers. The rise of a dominant presidency has occurred with relatively little congressional opposition. Indeed, when President Obama pledged to circumvent Congress, he received rapturous applause from the very body that he was promising to make practically irrelevant.

The President's pledge to effectively govern alone is alarming but what is most alarming is his ability to fulfill that pledge. When a president can govern alone, he can become a government unto himself, which is precisely the danger that the Framers sought to avoid in the establishment of our tripartite system of government. In perhaps the saddest reflection of our divisive times, many of our citizens and Members are now embracing the very model of a dominant executive that the Framers fought to excise from our country almost 250 years ago.

I have previously testified on the erosion of the separation of powers in our system[1] and I have written on that subject both as an academic[2] and as a legal commentator.[3] As those writings

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[1] *See Enforcing the President's Constitutional Duty to Faithfully Execute the Laws: Hearing Before the H. Comm. on the Judiciary*, 113th Cong., February 26, 2014 (statement of Jonathan Turley, Professor, The George Washington University Law School); *The President's Constitutional Duty to Faithfully Execute the Laws: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. (2013) (statement of Jonathan Turley, Professor, The George Washington University Law School); and *Executive Overreach: The President's Unprecedented "Recess"*

reflect, these concerns pre-date this Administration. Frankly, as a constitutional scholar, my focus is on the means rather than the merits of the policy disputes between the branches. Our system was designed to withstand enormous pressures and change. What we are witnessing today is one of the greatest challenges to our constitutional system in the history of this country. It did not start with President Obama. Indeed, some of the earliest presidents were guilty of executive over-reach and more modern presidents from Reagan to George W. Bush were challenged over their unilateral actions. As my friend Walter Dellinger noted in prior testimony during the Bush Administration, the encroachment of executive power has become a threat to the separation of power and a direct challenge to the obligation of presidents to faithfully execute federal laws.[4] Professor Dellinger called upon "the next President [to] commit to respecting important structural safeguards that check against presidential aggrandizement."[5] I shared the same concerns at that time and we would not be here today if President Obama had heeded Professor Dellinger's wise advice. However, the aggrandizement that we saw in prior administrations has continued unabated and, as I have previously stated, it has reached a constitutional tipping point that threatens a fundamental change in how our country is governed.

Appointments: Hearing Before the H. Comm. on the Judiciary, 112th Cong. 35-57 (2012) (statement of Jonathan Turley, Professor, The George Washington University Law School).

[2] Jonathan Turley, *Of Mies and Men: How Form Follows Function in Constitutional and Architectual Interpretation*, 83 George Washington Law Review ___ (2014); Jonathan Turley, *Recess Appointments in the Age of Regulation*, 93 B.U. L. Rev. 1523 (2013); Jonathan Turley *Constitutional Adverse Possession: Recess Appointments and the Role of Historical Practice in Constitutional Interpretation* 2103 Wisconsin Law Review 965 (2013); Jonathan Turley**,** Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy, 70 GEO. WASH. L. REV. 649, 739 n.579 (2002).

[3] This criticism of the rise of a dominant presidency goes back many years and included criticism of presidents going back to Reagan. *See e.g*., Jonathan Turley, *How Presidents Start Wars* Military History Magazine, July/August 2007, at 1; Jonathan Turley, *Can Congress Stop the War?*, USA Today, January 18, 2007, at 13A; Jonathan Turley, *A Check on Wartime Power*, The National Law Journal, March 7, 2005, at 34; Jonathan Turley, *Appetite for Authoritarianism*, The Los Angeles Times, May 2, 2003, at AI5; Jonathan Turley, *Ashcroft Tries to Excise Justice From Courts,* Newsday, August 12, 2003, at A27. Jonathan Turley, *George Bush's Big Brother,* The Los Angeles Times, Nov. 17, 2002, at M5; Jonathan Turley, *Ashcroft's Law West - and East - of the Pecos,* The Los Angeles Times (Sunday), Nov. 13, 2002, at AI3; Jonathan Turley, *The President and the Presidency,* The Los Angeles Times, July 15, 2002;; Jonathan Turley, *A War Powers Quandary*, The Los Angeles Times, December 21, 2001, at A19l; Jonathan Turley, *Bush's Secret Court: A Legal System in a Burka,* The Los Angeles Times, November 15, 2001, at A13, Jonathan Turley, *Nothing Bars Questioning the President's Bad Ideas: The Limits of Executive Privilege,* The Los Angeles Times, September 27, 1999, at A7; Jonathan Turley, *Checking the Executive Pulse,* The Los Angeles Times, November 19, 1998, at All; Jonathan Turley, *Clinton Maneuvers Threaten His Office,* The National Law Journal, February 23, 1998 at A19. The most recent writings obviously focus on the policies of President Obama.

[4] Hearing on "Restoring the Rule of Law," United States Senate, Committee on the Judiciary, Sept. 16, 2008 (Joint Statement of David Barron and Walter Dellinger) (criticizing President Bush for violating the Separation of Powers and ignoring congressional authority) ("Under this Administration, lawyers in the Executive Branch have wildly misinterpreted what the Constitution says about the extent of presidential authority, and as a result the President has erroneously claimed the authority to disregard laws that he is obligated to follow.").

[5] *Id.* This advice also included a well-deserved criticism of the Office of Legal Counsel for "the failure of the OLC in the current Administration to live up to its proper role – including its willingness to operate as an advocate and to offer thinly plausible, or even implausible, legal justifications for the President's policy goals." *Id.* at 8. That advice was also ignored. As I noted in my earlier testimony addressing the opinion issued by Assistant Attorney General Virginia Seitz and the Office of Legal Counsel on recess appointments – a position that ultimately did not garner a single vote on the Supreme Court in the *Canning* decision. Executive Overreach, supra, at 49; see also Jonathan Turley *Constitutional Adverse Possession: Recess Appointments and the Role of Historical Practice in Constitutional Interpretation* 2103 Wisconsin Law Review 965 (2013).

I have long advocated action by Congress against the erosion of legislative authority. This included criticism of President Bush for encroaching on legislative authority when the Democrats were in control of this House. However, for years, congressional leadership has remained timid in asserting the authority of this institution, particularly after 9-11. I have specifically supported efforts to secure judicial review, including my representation of both Democratic and Republican Members challenging the Libyan War.[6] That case failed because the action was brought by individual Members and the court adopted a restrictive approach to standing. Nevertheless, it is important for Congress to continue to fight for access to the courts. Madison and his colleagues expected that Congress would fight zealously to protect its own authority regardless of who was in the White House. Members of Congress have long assumed a purely pedestrian view as their authority is sapped away by the presidents, acting as mere witnesses to an inexorable expansion of the American presidency.

The current poisonous climate, however, is not entirely the fault of the two political branches or the two parties. The courts have played the most significant role in the transcendent rise of the American presidency by barring lawsuits and avoiding rulings in separation disputes. Indeed, I believe much of the dysfunctional politics criticized today is the result of the failure of courts to perform their most critical function in minding the lines of separation. The void left by the courts has left the two parties with raw muscle tactics. As prior presidents have slowly bled away legislative authority, the courts have stubbornly insisted that the executive and legislative branches would have to work things out. It is akin to a group of the best doctors in the world standing around and screaming at an anemic patient to "heal yourself." In the meantime, much of the actual governance during this period has shifted away from political representatives and toward executive branch officials. We have seen the rise of a type of "fourth branch" of federal agencies with increasing power and independence over the governance in this country.[7] If this body is to remain truly relevant into the next century, it will have to fight for the constitutional territory lost over years of erosion. While the lawsuit by the House of Representatives faces considerable challenges, the effort to recommit the Judiciary to this core function is a worthy and long overdue effort by this institution.

I. BACKGROUND

One of the most common misconceptions of our constitutional system is that the Separation of Powers doctrine was created for the benefit of the three branches of government. In reality, it was meant to protect individual, rather than institutional, rights. The Framers feared the concentration or aggrandizement of power. Such dominant power breeds a threat to individual liberty interests. While the Framers feared tyranny in any of the three branches, much of this concern was directed at the Chief Executive for obvious reasons. The Framers were well versed in the history of England and were familiar with the need to limit executive authority in the

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[6] *See* Jonathan Turley, *Members of Congress Challenge Libyan War in Federal Court*, JONATHAN TURLEY: RES IPSA LOQUITUR ("THE THING ITSELF SPEAKS") (June 15, 2011), http://jonathanturley.org/2011/06/15/members-of-congress-challenge-libyan-war-in-federal-court/ (discussing representation of Members challenging the intervention by President Obama in the Libyan War).

[7] *See generally* Jonathan Turley, *Recess Appointments in the Age of Regulation*, 93 B.U. L. Rev. 1523 (2013); Jonathan Turley, *The Rise of the Fourth Branch,* Washington Post (Sunday), May 26, 2013.

interpretation of laws. The core abuse was the notion of "royal prerogative,"[8] with the King being able to act unilaterally in his interpretation or suspension of laws. King James I claimed that he was simply applying "natural reason" to the enforcement of laws. He insisted that he had the right and duty to use his own judgment as to the proper course of the government since "law was founded upon reason."[9] While Kings did not refer to "gridlock," they denounced Parliament for being obstructionist or unreasonable. King Charles I clashed with the House of Commons for years and even stormed the chamber with troops. He believed in the divine authority of Kings and rejected the most basic notions of shared powers with the Parliament. He was eventually charged with "a high Breach of the Rights and Privileges of Parliament," including the violation of the "right and power of frequent and successive Parliaments." These and other conflicts led not only to King Charles I's execution but also to a strong view of the necessity of the separation of powers in the English, and later the American, systems.

It was precisely this sense of executive "prerogative" that the Framers wanted to avoid in creating the new American system. Thomas Jefferson wrote in 1783, with regard to the Virginia Constitution, "By Executive powers, we mean no reference to the powers exercised under our former government by the Crown as of its prerogative . . . We give them these powers only, which are necessary to execute the laws (and administer the government)."[10] The American president was to execute, rather than create, laws. Roger Sherman described "the Executive magistracy as nothing more than an institution for carrying the will of the Legislature into effect."[11] Likewise, James Wilson defended the model of an American president by assuring his colleagues that "[h]e did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature."[12]

Reflecting these views, the Framers stated that the President "shall take care that the laws of the United States be duly and faithfully executed." It was a direct mandatory statement that stood in contrast to the fluid notion of executive prerogative. I have previously testified on the history and meaning of that clause, which I will not repeat here. However, some of President Obama's statements come strikingly close to assertions by King James I that he could apply "natural reason" to the alteration, and even the suspension, of federal laws. Today this "natural reason" is often expressed as deference to executive agencies in the logical application of laws. Those were reflected in the last hearing with Simon Lazarus, who did an able job in defending the Administration. Reflecting the public statements of the Administration, Lazarus insisted the delays and changes in the Patient Protection and Affordable Care Act (ACA) were "sensible" choices made "to simplify and improve" the relevant provisions.[13] These "sensible" improvements include the suspensions of key deadlines and provisions that could result in expenditures of billions of dollars in federal subsidies not approved by Congress. There may be good reasons for such changes. However, this is not a question of *what* to do but *how* should

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[8] *See* Julius Goebel, Jr., Ex Parte Clio, 54 Colum. L. Rev. 450, 474 (1954); David Gray Adler, *The Steel Seizure Case And Inherent Presidential Power*, 19 Const. Commentary 155, 164 (2002).

[9] 7 Sir Edward Coke, Reports 65, quoted in Roscoe Pound, The Spirit of the Common Law 5 (1921) at 61.

[10] This quote is from Jefferson's Draft of a Fundamental Constitution for Virginia. Adler, *supra*, at 164 (citing Charles Warren, The Making of the Constitution 177 (Harvard U. Press, 1947)).

[11] Farrand, *supra*, at 65; Adler, *supra*, at 164-65.

[12] Farrand, 1 Records at 62-70; Adler, *supra*, at 165.

[13] *The President's Constitutional Duty to Faithfully Execute the Laws: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. at 3 (2013) (statement of Simon Lazarus).

such changes be made and, more importantly, *who* should make them? Some of the changes unilaterally ordered by the President were previously sought from Congress. After Congress did not approve such changes, President Obama announced that he would go it alone. He proceeded to order the changes that he felt Congress should have made. He simply resolved the division with Congress by ordering changes on his terms as a majority of one.

There is no license in the Madisonian system to "go it alone." Our country is sharply divided politically and that division is manifested (as it should be) in Congress. During times of division, less may get done. Both sides must either compromise or seek to change the balance of power in the next election. The assertion of executive prerogative to implement changes without Congress is tantamount to a pledge to govern alone.[14] Such a dominant executive certainly promises to "get things done" but at a prohibitive cost. Those who remain silent today should consider that, in less than three years, a different president will sit in the Oval Office. That person could use the very same claims to suspend environmental or anti-discrimination laws. The short-term benefits of achieving such changes will pale in comparison to the long-term damage to our system from fueling the rise of an American über-presidency. The safeguard for our system remains our federal judiciary, but as discussed below, the courts have increasingly detached constitutional rights from judicial remedies.

II. THE PERIL OF RIGHTS WITHOUT REMEDIES IN A CONSTITUTIONAL SYSTEM

It is axiomatic that in any viable constitutional system, rights must have remedies or the system is little more than aspirational in character. Yet, years of judicial rulings have narrowed standing rules so substantially that it seems that, even for some flagrant violations, no one can satisfy Article III's case or controversy requirements to be heard in federal court. This was certainly the case with the Libyan War, when the Democratic and Republican Members were denied even a hearing on the circumvention of Congress in the commencement of war operations. In refusing to allow Members to argue the merits of their constitutional challenge, Judge Reggie Walton insisted that Members had no right to raise the issue in his court.[15] The Obama Administration argued that the President alone defined what constituted a "war" for the purposes of Article I declarations so, as long as he used a different noun like a "kinetic military action,"[16] neither the Congress nor the courts had any jurisdictional claim. Judge Walton referenced such powers as impeachment as options for Congress with the power of the pulse to constrain a

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[14] The unilateral assertion of authority has found expression in a variety of different areas and different issues. *See e.g.*, Jonathan Turley, *Goodbye Hobby Lobby, Hello Halbig,* Los Angeles Times, June 30, 2014; Jonathan Turley, *Restoring Balance Among The Branches of Government* (co-authored with U.S. Sen. Ron Johnson), Washington Post (Sunday), June 29, 2014; Jonathan Turley, *Another Federal Agency Goes Outside of Bounds Over Redskins Name,* Washington Post (Sunday), June 22, 2014; Jonathan Turley, *The Rise of the Fourth Branch,* Washington Post (Sunday), May 26, 2013; Jonathan Turley, *Obama and Executive Over-Reach*, The Chicago Tribune, March 12, 2014; Jonathan Turley, *How Nixon Won Watergate*, USA Today, March 26, 2013; Jonathan Turley, *The Imperial Presidency*, American Legion Magazine, May 21, 2014; Jonathan Turley, *A Question of Power*, The Chicago Tribune, March 12, 2014; Jonathan Turley, *The Constitutional Tipping Point*, Los Angeles Times (Sunday), March 9, 2014; Jonathan Turley, *Abuse Of Power: Obama's Recess Appointments And The Constitution,* USA Today, February 15, 2012.

[15] *Kucinich v. Obama*, 821 F. Supp. 2d 110 (D.D.C. 2011).

[16] Jonathan Allen, *"Kinetic Military Action" or War?* Politico, March 24, 2011.

president.[1718] These suggested options of self-help are a virtual mantra in cases of judicial avoidance. However, as evidenced by the growing circumvention of Congress, these options offer more rhetorical than real checks on executive over-reach.

Before addressing these remedies, however, it is important to note that the reference to such powers is based on a suggestion that, so long as the political branches could act to counter unconstitutional acts, courts should avoid review through standing limits. I have long objected to that premise. There are any number of reasons why Congress may not move to check a president acting unconstitutionally. A majority of Congress may be from the President's party or may be fearful of a public backlash. The fact that a majority in Congress can remain silent or acquiesce to unconstitutional actions is regrettably nothing new to our country. However, such failure of principle does not change the character of an unconstitutional act. Indeed, courts presumably would not take the same approach to a violation of free speech – dismissing the need for judicial review given the ability of Congress to move to counter the denial of first amendment rights or the ability of citizens to find some other way of expressing themselves. The fact that Congress has failed to shoulder its duty to protect constitutional rights or powers is no excuse for courts to do the same.[19] The courts were created for the purpose of judicial review and there is no greater obligation than to police the lines of separation, which prevent the concentration of authority in any one branch. Such aggregation was barred to protect not individual but institutional rights in our system.

A. The Constitutional Mythology Surrounding the Power of the Purse

The "power of the purse" is the classic example of congressional power within the separation of powers.[20] However, with modern appropriation rules, it has become something of a constitutional mythology in many cases. Due to modern budget rules, it is practically difficult for Congress to immediately alter government programs with appropriation changes. There are billions sloshing around in federal budgets that can be moved around to fill gaps in funding. The Libyan War is a good example. President Obama announced that he would not ask Congress for authority to attack another country, including attacks on its capital and military units in support of rebel forces. Instead, he merely shifted billions to fund a war without the need to ask for immediate funding. President Obama supplied an even more relevant example under the ACA. As reported by the *Washington Post*, "[t]he Obama administration plans to use $454 million in

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[17] *Id.* at 120 n.7 (quoting *Campbell v. Clinton*, 203 F.3d 19, 23 (D.C. Cir. 2000)).
The *Campbell* court also referred to a law to forbid the use of U.S. forces. However, President Obama and other presidents have asserted that they have unilateral authority to commit troops and contested the authority to limit such executive determinations. Once again, such an assertion would result in a circular argument with the Administration again challenging the right of Members to seek judicial review in these cases under standing rules.

[19] In the same fashion, the mere fact that Congress could act in the future to undo the nullification of a prior vote should be immaterial to the finding of the violation of legislative authority. This point was made by Judge Randolph in *Campbell* (who is also one of the judges in the forthcoming *Halbig* decision): "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." *Campbell*, 203 F.3d at 32 (Randolph, J., concurring in the judgment).

[20] *See, e.g., 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.").

Prevention Fund dollars to help pay for the federal health insurance exchange. That's 45 percent of the $1 billion in Prevention Fund spending available [in 2013]."[21] The unilateral action to move hundreds of millions from an appropriated to a non-appropriated purpose led even leading Democratic Members to denounce the act as "a violation of both the letter and spirit of this landmark law."[22] However, that open disregard of the power of the purse resulted in nothing of consequence for the Administration. Congress was simply circumvented and the President effectively self-appropriated federal funds for his own priorities.

This is not to suggest that the power of the purse is meaningless. Rather, it is neither immediate nor determinative in many cases. There is a host of ways for presidents to circumvent efforts to change governmental programs through appropriation limits. For example, Congress passed a bill containing a bar on the use of federal funds to support the work of the "Public Advocate" at the Immigration and Customs Enforcement (ICE). The ban on funding of the controversial positions passed both houses and was signed into law by President Obama. The Department of Homeland Security Appropriations Act of 2013 clearly stated that "[n]one of the funds made available by this Act may be used to provide funding for the position of Public Advocate within U.S. Immigration and Customs Enforcement." However, the Administration simply gave the same official a new title and continued the same work, unimpeded by the congressional actions. On one level, the response was a rather predictable, if hostile, move to circumvent Congress. By focusing on the name of the office, Congress allowed the Administration to simply change the name. However, what is equally notable is that the shift was easily made using existing discretionary funds.

The power of the purse is still a check but it is not a compelling basis to justify judicial avoidance and it is not nearly as potent as it once was. Modern appropriations have radically altered how funding impacts government. Money in the pipeline guarantees the continuation of funding for programs and large reserves allow presidents to independently maintain programs. Whole military campaigns have been funded out of discretionary or loosely dedicated funding. Moreover, as shown with the ACA controversy, the shifting of even hundreds of millions of dollars leads us back to the same question of who has the standing to sue. The courts have left Congress with a maddeningly circular dilemma. Courts refuse to rule on inter-branch violations by referring to the power of the purse, but when there are violations of that appropriations power, standing rules tend to bar anyone challenging the violations. Absent legislative standing, the injury associated with shifting funds, as with the ACA change, is largely institutional and is generally difficult to fit within the current morass of standing precedent.

B. Impeachment: The Divergence of Political Rhetoric and Constitutional Realities

It has been striking that, from the first hearings on executive over-reach, there has been a tendency of some on both the left and the right to redefine these claims against the President into

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[21] Sarah Kliff, *The Incredible Shrinking Prevention Fund*, Washington Post, April 9, 2013.

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

calls for impeachment [23] References to such an extreme measure certainly paint criticism of the President as extreme by association. However, impeachment has never been the focus of those who are critical of the constitutional violations committed by President Obama. Separation of powers violations historically have not been treated as high crimes and misdemeanors under Article II.[24] As someone who testified during the Clinton impeachment[25] and served as lead counsel in the last judicial impeachment,[26] I have always discouraged such references to impeachment. Impeachment is an extraordinary remedy that comes at great cost to the country. It is not some Clauswitzian measure for politics by other means.

This is not to say that Separation of Powers violations can never satisfy the Article II standard. However, such disputes are common in a tripartite system and the Framers created the Judiciary – with life tenure and independence – to resolve the most serious conflicts along the lines of separation. Indeed, this is why the common references to impeachment by courts barring legislative standing are often frivolous and frustrating. Courts cavalierly refer to impeachment as one of the options available to Congress in order to rationalize their own refusal to exercise judicial review. Judicial review is the proper course for such controversies and is far less disruptive to our system.

The problem with converting this constitutional conflict into an impeachment case is, ironically, the courts themselves. After years of judicial avoidance, executive power in the United States has continued to increase at the cost of the Legislative Branch. As a result, presidents have claimed greater unilateral authority and have cited "historical practice" as a justification. Congress has failed to aggressively fight this aggrandizement of power for decades, through litigation or other means. Thus, the courts and the Congress have enabled this trend to continue and presidents can argue that they have a good-faith basis for their interpretations based on legislative history and judicial precedent.[27] Impeachment is not warranted in such cases of

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[23] *Hearing Or Elephant? Washington Post Portrays Republicans At Presidential Abuse Hearing As Impeachment Obsessed*, www.jonathanturley.org, Dec. 4, 2013 http://jonathanturley.org/2013/12/04/a-different-hearing-or-different-elephant-washington-post-portrays-republicans-at-presidential-abuse-hearing-as-impeachment-obsessed/

[24] Art. II, Sec. 4 ("The President, Vice President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other *high crimes and misdemeanors*."). *See generally* Jonathan Turley, *"From Pillar to Post": The Prosecution of Sitting Presidents,* 37 American Criminal Law Review 1049-1106 (2000); Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 Duke Law Journal 1 (1999); Jonathan Turley, *The "Executive Function" Theory, the Hamilton Affair and Other Constitutional Mythologies*, 77 North Carolina Law Review 1791 (1999); Jonathan Turley, *Congress as Grand Jury: The Role of the House of Representatives in the Impeachment of an American President,* 67 George Washington University Law Review 735-790 (1999) (Symposium).

[25] United States House of Representatives, Committee on the Judiciary, Subcommittee on the Constitution, on "The Background and History of Impeachment," November 9, 1998 (statement of Professor Jonathan Turley).

[26] Ben Evans, Senate Opens Impeachment Trial Against Judge, NBC, July 13, 2010 (http://www.nbcnews.com/id/39149411/ns/politics-capitol_hill/t/senate-opens-impeachment-trial-against-judge/#.U8FzFla3lG4).

[27] I have been a long critic of the use of legislative history as a basis for statutory interpretation. *See generally* Jonathan Turley *Constitutional Adverse Possession: Recess Appointments and the Role of Historical Practice in Constitutional Interpretation* 2103 Wisconsin Law Review 965 (2013). The decision in *NLRB v. Noel Canning*, 572 U.S. ___ (2014), was an important and long overdue rejection of such arguments.

rivaling constitutional interpretations when courts have refused to resolve the question.[28] Indeed, impeachment makes for a poor vehicle of resolving constitutional interpretive disagreements since it is a device left largely to Congress with little grounds for appeal. To funnel constitutional disputes into the impeachment process would be to circumvent the Judicial Branch, a shift that would be unfair to the Executive Branch. We have a branch established to render decisions on constitutional interpretations in an independent and informed fashion and it must do so.

The opposition of some to the concept of an institutional lawsuit is curious in light of the fact that the absence of judicial review reduces the options for Congress outside of impeachment. It is precisely the absence of judicial review that fuels the view that impeachment is the only meaningful option to stop the President from continuing to exceed his authority. The effort to block access to the courts in such conflicts only serves to elevate impeachment over the more reasonable and logical avenue of judicial review.

III. THE IMPORTANCE OF INSTITUTIONAL ACTION TO RE-BALANCE THE BRANCHES

Rather than continue this unresolved and worsening controversy over the separation of powers, the House is seeking authority to bring the matter to the courts. That is precisely where such lingering questions should be resolved. Is such judicial review truly worse than having the branches continue to flail around in this uncertainty over their respective powers? The President has insisted that he finds the current impasse with Congress to be unacceptable, but his Administration continues to fight judicial review that would help establish the relative lines of authority between the two political branches. That would certainly not end the divisiveness in Congress. We are, and are likely to remain, a divided country politically, particularly in areas like immigration and health care. However, the affirmation of the lines of separation will help (as intended) to direct and confine such disagreements to their respective branches. In other words, we can continue to argue but we should argue about the right things: the merits of these policies as opposed to the means. When the courts have rendered such judgments, the impact has been highly beneficial in reinforcing the structural relations of the branches. Thus, in *INS v. Chadha*,[29] the Court struck down the one-house veto on the ground of Separation of Powers. The result was greater clarity in not just the enforceability of the executive policies, but also in the inherent authority of the legislative branch. Regardless of which branch loses in such challenges, such decisions advance compromise and deliberation by confirming the area for interaction between the branches.

I am particularly relieved to see the authorization proposal's focus on the ACA. As I have previously discussed in testimony, there are other areas of separation violations that could be addressed in the immigration and other arenas. However, if the drafters make this complaint into a peddler's wagon of grievances against the President, it is likely to fail. The ACA changes constitute some of the strongest separation claims and raise the most serious institutional injuries for judicial review. I understand that there are good-faith arguments that this is merely the exercise of recognized executive or agency authority. However, I still believe that all Members

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[28] A president's systemic violation of separation of powers could create a basis for impeachment, particularly when such acts involve serious inherent misconduct other than an institutional conflict with other branches. However, a novel separation-based claim would require clarity regarding underlying presidential violations.

[29] 462 U.S. 919, 939 (1983).

of Congress should support access to the courts in such disputes. In that sense, while some Democratic Members may disagree on the merits of the ACA interpretations, there should be unity on the question of legislative standing and access to the courts. Members opposing standing today are embracing a position to insulate executive authority and to minimize the countervailing authority of their institution. At the very least, both sides should be able to agree that there are legitimate questions raised by these significant changes worthy of judicial resolution. The ACA by any measure is one of the most costly and significant federal programs ever attempted in this nation's history. If it is going to continue (as expected) to grow, it should do so unencumbered by these questions of legitimacy.

Some of the changes ordered by President Obama did, in my view, cross the constitutional line in violation of the Separation of Powers. I have not seen or been briefed on this lawsuit. However, some of the more serious violations are well-documented. One of the most compelling – and the one that Members of both parties should be able to support challenging – is the shifting of appropriated funds to other purposes. As discussed earlier, the power of the purse is routinely raised by courts as the way for Congress to control a president who is exceeding his authority. However, the decision of President Obama to move $454 million from the Prevention and Public Health Fund to support exchange operations demonstrates the limitations on this power. Moreover, in violations regarding the use of appropriated funds, there is often no clear private party that could bring a lawsuit (unlike issues such as the state exchange controversy in cases like *Halbig*). The absence of such private parties as an alternative to Congress is a powerful prudential argument in favor of standing. This is only a fraction of the discretionary and dedicated funds that were shifted by the Administration. These appropriation changes strike at the heart of congressional authority and the heart of the judicial rationalizations for refusing to review separation conflicts.

Another strong claim that is the subject of *Halbig v. Bulwell*, discussed below, concerns the tax credits linked to state exchanges. At issue is the express language of the statute that ties the creation of state (as opposed to federal) exchanges to the availability of tax credits. Congress established the authority of states to create their own exchanges under Section 1311. If states failed to do so, federal exchanges could be established under Section 1321 of the Act. However, in Section 1401, Congress established Section 36B of the Internal Revenue Code to authorize tax credits to help qualifying individuals purchase health insurance. However, Section 1401 expressly links tax credits to qualifying insurance plans purchased "through an Exchange *established by the State* under 1311." The language that the qualifying exchange is "established by the State" seems quite clear, but the Administration faced a serious threat to the viability of the Act when 34 states opted not to create exchanges. The Administration responded with an interpretation that mandates: any exchange – state or federal – would now be a basis for tax credits. In adopting the statutory construction, the Administration committed potentially billions in tax credits that were not approved by Congress. The size of this financial commitment without congressional approval also strikes at the essence of congressional control over appropriation and budgetary matters.

There have been dozens of changes in deadlines and other provisions under the ACA. I happen to agree with many of these changes but some are in direct conflict with legislative text. For example, Congress originally mandated that non-compliant policies could not be sold after October 1, 2014. That provision was unpopular with certain groups and the Obama

Administration unilaterally ordered a two-year extension that allowed insurance companies to sell non-compliant, and thus unlawful, policies until October, 2016.[30]

Another such change occurred with regard to the deadline for private employers with more than 50 full-time employees. 26 U.S.C. §4980H (c)(2)(A). This deadline was viewed by some as a critical element to the law and was arrived at after considerable debate. The Act expressly states that these provisions would become active a January 1, 2014. *See* ACA § 1502 (e). However, as the popularity of the Act continued to fall, the Administration moved unilaterally to set its own deadline and thereby suspend annual penalties that would have brought in huge revenues in sanctions to the extent that businesses did not comply. Ironically, the Administration announced this sweeping change on a Treasury Department blog under the almost Orwellian title: "Continuing to Implement the ACA in a Careful, Thoughtful Manner." It simply stated that the employer mandate and its reporting obligation "will not apply for 2014."[31] That change cost the government an estimated $10 billion in annual revenue.[32] Then on February 10, 2014, the Administration again altered the statute by exempting employers with between 50 and 99 full-time employees from all aspects of the employee-coverage requirements until 2016.[33]

Notably, these changes not only alter the express language of the federal law but also have enormous impact on revenues coming back into the system – a key factor in the selling of the ACA as financially viable. Another such example is found in the change to the individual mandate coverage. The ACA was sold to many Members as largely funded by younger Americans who would be putting in money and not taking much out through insurance claims. The law therefore contains a narrow exemption for citizens claiming "hardship," limiting such claims to insurance costs exceeding eight percent of household income. This limitation was meant to guarantee that people would not "wait to purchase health insurance until they needed care." 42 U.S.C. §18091(a)(2)(I). Faced with a public outcry over the loss of their insurance despite the promise of President Obama during the legislative debate that "if you like your healthcare plan, you can keep it," the Administration decided to fundamentally alter the hardship provision. The Administration simply revised the language to say that anyone could secure the exemption if they "complete a hardship exemption form, and indicate that [their] current health insurance policy is being cancelled and [they] consider other available policies unaffordable."[34]

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[30] Centers for Medicare & Medicaid Services, "Extended Transition to Affordable Care Act-Compliant Policies, Mar. 5, 2104, *available at* http://www.cms.gov/CCIIO/Resources/ Regulations-and-Guidance/Downloads/transition-to-compliant-policies-03-06-2015.pdf

[31] U.S. Dept. of Treasury, "Continuing to Implement the ACA in a Careful, Thoughtful Manner," July 2, 2013, *available at* http://www.treasury.gov/connect/blog/pages/ continuing-to-implement-the-aca-in-a-careful-thoughtful-manner-.aspx. The Administration subsequently issued official guidance in IRS Notice 2013-45, *available at* http://www.irs.gov/ pub/irs-drop/n-13-45.PDF.

[32] *See* Congressional Budget Office, "Analysis of the Administration's Announced Delay of Certain Requirements Under the Affordable Care Act," *available at* http://www.cbo.gov/ publication/44465.

[33] *See* U.S. Dept. of Treasury, Press Release, "Treasury and IRS Issue Final Regulations Implementing Employer Shared Responsibility Under the Affordable Care Act for 2015," *available at* http://www.treasury.gov/press-center/press-releases/Pages/jl2290.aspx; *see also* Questions and Answers on Employer Shared Responsibility Provisions Under the Affordable Care Act, *available at* http://www.irs.gov/uac/Newsroom/Questions-and-Answers-on-Employer-Shared-Responsibility-Provisions-Under-the-Affordable-Care-Act #Transition.

[34] U.S. Dept. of Health and Human Services, "Options Available for Consumers with Cancelled Policies," Dec. 19, 2013, *available at* http://www.cms.gov/CCIIO/Resources/ Regulations-and-Guidance/Downloads/cancellation-consumer-options-12-19-2013.pdf.

These are but a few of the more compelling objections made by Congress to the unilateral actions taken by the Administration. Putting aside the standing challenges discussed below, the challengers would have a strong case on the merits. Once again, regardless of the outcome, the Congress as an institution should favor an effort to reinforce access to the courts to resolve such controversies. Indeed, these lingering questions often come at great cost when executive actions are found to be unconstitutional. For example, by refusing to follow the Constitution on recess appointments, a huge array of rulings and policies out of the NRLB are now in question and could be viewed as invalid after the ruling in *NLRB v. Canning*. Likewise, the President's recent loss in *Hobby Lobby* regarding the contraceptive coverage will require huge changes in the provision of such coverage. Even greater costs would likely arise with a loss over the federal exchanges in cases like *Halbig*.

The resistance to having these separation questions resolved by federal courts tends not only to magnify these costs but also to degrade the legislative process by which they can be resolved. While the President is clearly exasperated by the opposition that he has encountered in Washington, the Framers created a system that often forces compromise between factional and political groups. That legislative process tends to produce laws with a broader base of support and, frankly, a better product after going through the difficult revisions and conferences. What emerges is not always perfect but it does have the legitimacy of a duly enacted law. It is that legislative process that is the key to the success of the American system. Thus, the loss caused by the circumvention of the legislative branch is not simply one branch usurping another. Rather, it is the loss of the most important function of the tripartite system in channeling factional interests and reaching resolutions on matters of great public importance.

IV. THE CHALLENGES FACING A HOUSE LAWSUIT FROM STANDING TO AGENCY DEFERENCE

As I have stated, I believe that the Congress can present highly compelling arguments that President Obama has violated the Separation of Powers in ordering unilateral changes to the ACA. However, while the President has taunted Congress to "sue me,"[35] the Administration is clearly preparing to challenge the right of Congress to be heard by any federal judge. The Administration has fought (largely successfully) to prevent judicial review for both Members of Congress and public interest groups over alleged constitutional violations from separation of powers to civil liberties.

It is important to begin this discussion by acknowledging a case that represents something of a torpedo in the water for the ACA, though it has generated relatively little discussion. We are waiting for the release of the decision in *Halbig v. Burwell*. I have written about this case before the United States Court of Appeals for the District of Columbia as a far more significant threat to the viability of the ACA than better known cases like *Burwell v. Hobby Lobby Stores*, Inc.[36] This case raises the issue of extension of tax credits to citizens in the 34 states that failed to establish state exchanges under the ACA. *Halbig* could find this change to be a violation of the Separation of Powers and present a significant blow to the Administration

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[35] *Obama to Republicans: "So Sue Me,"* CNN, July 1, 2014.

[36] Jonathan Turley, *Goodbye Hobby Lobby, Hello Halbig: Get Ready for Any Even Greater Threat to Obamacare*, Los Angeles Times, July 1, 2014; Jonathan Turley, *"So Sue Me": Presidential Taunts and Constitutional Consequences*, New York Daily News, July 7, 2014.

legally and practically. The impact of a loss in *Halbig* could affect the House lawsuit in different ways. On one hand, since standing was clear for the *Halbig* plaintiffs, the White House could actually point to the case as evidence that denying legislative standing does not insulate the ACA claims – at least with regard to the exchanges – from challenge. On the other hand, the loss would join *Canning* and *Hobby Lobby* as another major ruling against the President's unilateral actions.[37]

While there are a host of issues that may arise, the two most looming issues are the threshold question of standing and the merits question of agency discretion.

A. Standing: Overcoming Judicial Avoidance In Separation Cases

Legislative standing represents one of the most promising means to realign the three branches.[38] However, standing cases remain conflicted, confusing, and sometimes counterintuitive. To put it simply, the Supreme Court has made a bloody mess out of standing. Of course, "standing" does not appear anywhere in the Constitution as a term or even by reference. It is a creation of the courts and has changed over the years to create a growing barrier for access to the courts – not just for Members but for citizens as a whole. These cases make any lawsuit an uphill fight but there are good arguments to be made in favor of an institutional claim for standing.

There is certainly good-faith disagreement on the scope of standing given the limitation under Article III for review of only "cases" and "controversies."[39] However, I believe the current situation would have been anathema to the Framers who created a structural system to funnel the pressures of government into a transformative legislative process. The Court has allowed a narrow window for standing for Members for cases involving personal injury or institutional injury.[40] It is the latter category that holds the most promise for Congress in separation cases, albeit limited given the overtly hostile attitude of the current federal bench.[41]

In my view, Members – whether individually or as an institution – represent ideal litigants in separation controversies. The Court has long defended its increasingly narrow standing rulings on the belief that they guarantee that only those most affected by violations (and by extension, the best suited to argue such cases) would appear before the courts. Members, however, constitute a group of only 535 people, not a group that threatens to open a floodgate of litigation. Moreover, Members have institutional and political controls that would discourage continual lawsuits against a president. Most importantly, they have a unique injury. To put it simply, they have skin in the game when it comes to an interbranch fight. Conversely, any

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[37] Of course, any negative ruling by the D.C. Circuit would likely be appealed *en banc* by the Administration, but the panel decision would be binding precedent on any district court in the D.C. Circuit.

[38] Other nations have robust forms of legislative standing as a method of ensuring compliance the government. Indeed, this fact was acknowledged in *Raines*. *Raines v. Byrd*, 521 U.S. 811, 828 (1997) (Rehnquist, C.J.) (citations omitted).

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

[40] *Chenoweth v. Clinton*, 997 F. Supp. 36, 38-39 (D.D.C. 1998).

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

Members who file for simple political theater can be swiftly dismissed by courts. Yet, this relatively small group could be a vehicle for returning more clarity and strength to the lines of separation. Presidents have come to rely on standing barriers in maintaining policies over the objections that they are unconstitutional. With legislative standing, such claims could be reviewed and resolved, leaving the legislative process to function within those structural lines. The ACA is a prototypical example of the benefits of such review to remove questions of legality (and legitimacy) over unilateral changes over by presidents.

1. Case or Controversy Under Article III

The current standing precedent is built on an interpretation of Article III, Section 2, Clause 1 that refers to judicial power as based on "cases" or "controversies." As a constitutional standard, such an interpretation is not subject to legislative change. The result is that the Court can produce sweeping political and social change through the shrinking or expansion of standing. Generally, to have standing to be heard by a federal court, the plaintiff must show an injury-in-fact that is fairly traceable to the defendant's conduct and is redressable by the court.[42] It is the injury-in-fact prong that constitutes the greatest hurdle for Members, both individually and institutionally, in seeking judicial review. To establish such an injury, the Members must show, as do other litigants, that they "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.'"[43] However, in *Raines v. Byrd*,[44] the Court seemed to graft an added burden on Members. The case was brought by four senators and two house Members who had voted against the Line Item Veto Act.[45] The Court rejected standing but added that "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."[46] In 1997, the Court seemed to adopt the inverse of what the Constitution suggests: rather than accept its core function in policing the lines of separation, the Court signaled a preference to avoid that function and to require more from Members seeking review. The case was the low point for legislative standing but it is often referenced incorrectly as closing the door to such standing. It notably stopped short of such a holding.

Indeed, the Court has recognized legislative standing. In its first consideration of legislative standing, in *Coleman v. Miller*, the Court recognized such standing.[47] The case was brought by 21 Kansas state senators and Members of the state House of Representatives who challenged the passage of the Child Labor Amendment to the United States Constitution. The senators alleged that the Lieutenant Governor illegally cast the deciding vote for ratification despite their deadlocking on the issue. While ruling against them on the merits, the Court found that they had standing because they had "a plain, direct, and adequate interest in maintaining the effectiveness of their votes."[48] Notably, this representation was not technically an institutional lawsuit since there was no express authorization from the legislature. However, the participation

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42 *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).
43 *Id.* at 560.
44 521 U.S. 811 (1997).
45 *Id.* at 816.
46 *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997).
47 307 U.S. 433 (1939).
48 *Id*. at 456.

of 21 out of 40 Members was treated as an institutional representation.

Coleman obviously presents an extremely compelling case of vote nullification (much like the later context of *Windsor*, involving abandonment by the Administration).[49] What followed was a series of unsuccessful actions brought by small groups of members. These cases are relatively few in number but one of the most restrictive was the ruling in *Campbell v. Clinton*[50], where the D.C. Circuit denied standing to 31 House Members challenging the sending of U.S. troops to Kosovo, Yugoslavia, by President Clinton. The D.C. Circuit rejected a nullification argument under *Coleman*. Of course, there are a couple of obvious distinctions with the current proposed lawsuit. First and foremost, *Campbell* was not an institutional lawsuit but a lawsuit brought by a minority of Members opposed to the military operation. Second, the current proposal concerns the outright negation of key parts of legislation. In *Campbell*, the President claimed to be acting under an independent, Article II authority as Commander-in-Chief. Nevertheless, the judicial avoidance rationale in *Campbell* is very strong and it remains, in my view, an example of the flawed analysis that has been replicated under Separation of Powers cases.

While the Article III standard remained rigid, the focus of these actions has been to emphasize the prudential considerations supporting standing. [51] Congress can alter standing under prudential principles but cannot alter the constitutional meaning of Article III.[52] Absent a constitutional amendment, a change in the interpretation of Article III can only come from the Court itself. The strongest claim has always been based on institutional filing taken on behalf of Congress or a house or even a committee.[53] Such a committee was found to have standing in *Committee on the Judiciary, U.S. House of Representative v. Miers* on the basis of institutional injury. Notably, however, this was to enforce a congressional subpoena where the committee was "expressly authorized by the House of Representatives as an institution."[54] The Court has recognized the right of Congress to appear in court to enforce subpoenas.[55] Standing arguments

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[49] Indeed, the Court in *Raines* would later distinguish *Coleman* by saying "[t]here 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." *Raines*, 521 U.S. at 826.

[50] 203 F.3d 19 (D.C. Cir.), *cert. denied* 531 U.S. 815 (2000).

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

[52] *See Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997)

[53] Conversely, in the view of the D.C. Circuit, the weakest such claim is a small number of legislators who are on the losing end of a legislative decision. That was the case in *Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999), *cert. denied* 529 U.S. 1012 (2000). That lawsuit was filed by four Members of the House seeking to enjoin the President's implementation of the American Heritage Rivers Initiative (AHRI) as a case of executive over-reach. However, the Members had failed to stop the AHRI through legislation. In fairness to those Members, an argument can be made that the mere fact that they are a small minority does not alter the merits of a constitutional challenge. As noted earlier, there have been plenty of times when a majority of Congress has remained silent in the face of executive branch abuses.

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

[55] *United States v. American Telephone and Telegraph Co.* (*AT&T*), 551 F.2d 384 (D.C. Cir. 1976) (recognizing that the House of Representatives standing to enforce congressional subpoenas); *Committee on Oversight and Government Reform, U.S. House of Representatives v. Holder*, XXX F. Supp.2d XXX 2013 WL 5428834 [979 F.Supp.2d 1] (D.D.C. Sept. 30, 2013) (same).

can be based on actions taken by a president to nullify the vote of Members. However, the Supreme Court in *Raines v. Byrd* warned that it would not allow claims that it considers based on "abstract and widely dispersed" injuries.[56] Legislative standing is strongest, as noted in *Miers*, when it "had been expressly authorized by the House of Representatives *as an institution*" to bring the suit by House resolution.[57] The Court also allowed Members as an institution to defend a federal law in *INS v. Chadha*[58], where the Administration assumed an adverse position to the immigration law by agreeing with the plaintiffs that it was unconstitutional. While the Court struck down the one-house legislative veto, the Court noted that it had "long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional."[59]

The mix of these standards was evident in *United States v. Windsor*, where Members were recognized as having standing.[60] The Court found that the Bipartisan Legal Advisory Group (BLAG) was properly heard in the case. However, the opinion was closely crafted around the novel facts in the case. The Obama Administration had abandoned defense of the federal statute in the midst of litigation, a highly controversial move that raised the ire of members of the Court. The majority ruled that "the prudential and Article III requirements are met here; and, as a consequence, the Court need not decide whether BLAG would have standing to challenge the District Court's ruling and its affirmance in the Court of Appeals on BLAG's own authority."[61] The decision clearly is a victory of legislative standing but the Court seemed determined to continue to keep legislative standing in an uncertain status.[62]

What is clear is that the Court has never rejected legislative standing, particularly in an institutional lawsuit, and indeed it has recognized such standing in the past.[63] In fact, in his dissenting opinion in *Windsor*, Justice Samuel Alito offered a strong defense of legislative standing, arguing that the House "was a necessary party to DOMA's passage," and that the Supreme Court has always accepted the proposition that "'Congress is the proper party to defend the validity of a statute' when the Executive refuses to do so on constitutional grounds."[64] The same rationale would seem present in an ACA-based challenge by BLAG. The Administration has not only changed core provisions of the ACA but it has refused to enforce or defend the

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56 *Raines,* 521 U.S. at 826.

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

58 462 U.S. 919, 939 (1983).

59 *Id.* at 940.

60 133 S. Ct. 2675, 2688 (2013).

61 *Windsor*, 133 S. Ct. at 2688.

62 In one sense, the authorization in this case is stronger than was the case in Windsor since BLAG was not given institutional representative authority from the House of Representatives until roughly two years after first intervening to defend DOMA. *See* H.R. Res. 5, 113th Cong. § 4(a)(1) (2013). In this case, the lawsuit itself is being authorized with the full institutional authority of the House of Representatives.

63 Of course, it is possible for Members to file a challenge based on their official capacity as legislators that does raise a personal injury. Such was the case in *Powell v. McCormack*, 395 U.S. 486 (1969), where Rep. Adam Clayton Powell and thirteen of his constituents sued the House over a House resolution excluding Powell from the chamber (the exclusion was the result of an investigation into violations of the rules governing travel and staff expenses). The Court held that Powell had a case or controversy in his personal standing as a legislator.

64 *Windsor*, 133 S. Ct. at 2713-14 (Alito, J., dissenting).

original program established by Congress. It is understandably hard for legislators to distinguish on a practical level between nullifying a vote (as in *Coleman*) and simply ignoring a vote (as alleged under the ACA). Either way, the core legislative function is negated.

None of this means that the lawsuit will have an easy time, after *Windsor*, in seeking judicial review. The House can expect an aggressive effort to bar the court from considering the merits of President Obama's alleged violations from the Justice Department. On the district court level, such arguments have historically prevailed in lawsuits brought by individual Members. The only way to bring clarity to this question is for Congress to continue to seek access to the courts and to continue to press judges to fulfill their core constitutional function in defining the lines of separation.

B. Agency Deference: Challenging The Authority of The Fourth Branch of Government

As previously stated, the greatest hurdle for Congress in challenging the unilateral actions of the President is not the merits but the threshold question of access to the courts. Nevertheless, if the House can overcome the standing objections of the Administration, it would likely face arguments that the changes in the ACA are standard matters of agency discretion long recognized by the Supreme Court. The merits of this case raise the shifting center of gravity in our system in favor of the Executive Branch. However, they also raise the increasing power of federal agencies as a type of "fourth branch" in our once tripartite system. Agencies have gradually assumed greater authority and independence in the governance of the country. Again, with the help of a series of Supreme Court decisions, agencies now enjoy sweeping deference in their enforcement of federal laws. The changes in the ACA reflect that new role. Agencies now treat federal laws like the ACA as merely ACA 1.0 that is then subjected to their own tweaks and changes. The result is an agency-amended ACA 2.0 that is materially different from the one debated and approved by the representatives of the public.

The rise of this fourth branch in our tripartite system raises difficult questions.[65] Today, the vast majority of "laws" governing the United States are not passed by Congress but are issued as regulations. Adding to this dominance are judicial rulings giving agencies heavy deference in their interpretations of laws under cases like *Chevron*. Recently, this Supreme Court added to this insulation and authority with a ruling that agencies can determine their own jurisdictions — a power that was previously believed to rest with Congress. In his dissent in *City of Arlington v. FCC*, Chief Justice John Roberts warned, "It would be a bit much to describe the result as 'the very definition of tyranny,' but the danger posed by the growing power of the administrative state cannot be dismissed."[66]

There have clearly been great benefits associated with this administrative system and modern government would be impossible without some agency deference. Yet, a fundamental change in our system is vividly demonstrated by the changes in the ACA where agencies have set aside critical deadlines, lifted limitations for exemptions, shifted hundreds of millions from appropriated purposes, and even committed the country to potentially billions in tax credits in conflict with the express statutory language. Few yearn for the days of *A.L.A. Schechter Poultry*

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[65] *See generally* Jonathan Turley, *Recess Appointments in the Age of Regulation*, 93 B.U. L. Rev. 1523 (2013); Jonathan Turley, *The Rise of the Fourth Branch,* Washington Post (Sunday), May 26, 2013

[66] *City of Arlington v. FCC*, 133 S. Ct. 1863, 1877 (2013).

Corp. v. United States.[67] However, the pendulum has swung so far in the opposite direction that agencies can now argue that fundamentally altering statutory language is insulated from judicial review as a matter of agency deference.

The Administration continues to argue that, in the modern governmental structure, laws are just the starting point and that agencies must implement those laws according to their best judgment. It is important to draw a distinction between the deference shown to agencies on technical questions as opposed to interpretive questions. It is certainly true that the Court has insisted that agencies are entitled to a degree of deference that reflects the myriad of "variables involved in the proper ordering of its priorities."[68] However, even in broadly deferential decisions like *Heckler*, the Court emphasized that such deference should not extend to an agency adopting a policy "that is so extreme as to amount to an abdication of its statutory responsibilities."[69] More importantly, the Court has rendered a series of decisions this term that strongly support the claims under the ACA. In *Michigan v. Bay Mills Indian Community*[70], for example, Justice Elena Kagan rejected the same type of "holistic" approach to statutory interpretation by the State of Michigan that is being advanced under the ACA by federal agencies:

> But this Court does not revise legislation, as Michigan proposes, just because the text as written creates an apparent anomaly as to some subject it does not address. Truth be told, such anomalies often arise from statutes, if for no other reason than that Congress typically legislates by parts -- addressing one thing without examining all others that might merit comparable treatment . . . This Court has no roving license, in even ordinary cases of statutory interpretation, to disregard clear language simply on the view that (in Michigan's words) Congress 'must have intended' something broader."[71]

Justice Kagan concluded by declaring that "We will not rewrite Congress's handiwork." Likewise, the Court rejected an agency interpretation in *Utility Air Regulatory Group v. EPA*[72] where the federal agency called for the same deference on an interpretation of the Clean Air Act. However, Justice Scalia wrote for the Court that such interpretations constitute the unconstitutional rewriting of federal law:

> We conclude that EPA's rewriting of the statutory thresholds was impermissible and therefore could not validate the Agency's interpretation of the triggering provisions. An agency has no power to "tailor" legislation to bureaucratic policy 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.'" *National Assn. of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 665, 127 S. Ct. 2518, 168 L. Ed. 2d 467 (2007) (quoting *Chevron*, 467 U.S., at 843, 104 S.Ct. 2778, 81

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67 295 U.S. 495 (1935).
68 *Heckler v. Chaney*, 470 U.S. 821, 842 (1985).
69 *Id.* at 833 n.4.
70 572 U. S. ____ , 134 S. Ct. 2024 (2014).
71 *Id.* at 2033-34.
72 189 L. Ed. 2d 372 (2014).

> L. Ed. 2d 694). 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." *Arlington*, 569 U.S., at ___, 133 S. Ct. 1863, 185 L. Ed. 2d 941, 951 (emphasis deleted).
>
> The Solicitor General does not, and cannot, defend the Tailoring Rule as an exercise of EPA's enforcement discretion.[73]

These two successive losses for the Administration were, of course, followed by the major loss in *Hobby Lobby*, where the Court rejected the exemption system devised by the Department of Health and Human Services (HHS) for corporations with religious objections to the contraception provisions of the ACA.[74]

These decisions would seem to offer varying degrees of support for challenges under the ACA despite years of opinions recognizing agency deference. In my view, such changes ordered by agencies over issues like tax credits and exemptions are not valid exercises of agency discretion and do constitute constitutional violations.

V. CONCLUSION

After years of eroding legislative authority, the decision of this body to take a stand and seek judicial review is a welcome change. The Obama Administration has advanced constitutional arguments on presidential power that can only be described as both extreme and largely devoid of limiting principles that characterize our constitutional system. The Administration has tended to not only minimize the authority of Congress but the authority of the courts in interbranch relations.[75] It is hard to imagine a convincing argument for non-action in the face of such assertions. In his last State of the Union, President Obama pledged to effectively govern alone, a pledge that he has largely fulfilled.[76] What insular victories may be accomplished

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73 *Id.* at 395.

74 *Burwell v. Hobby Lobby Stores, Inc.*, 2014 U.S. LEXIS 4505

75 In *Holder*, the district court noted that

> 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*.

979 F.Supp.2d 1, 12-13. This is consistent with the argument made in my representation of Members opposed to the Libyan War where the Obama Administration argued that the President alone defined what is a "war" and effectively controlled when a declaration of war is required under the Constitution. *See* Jonathan Turley, *Members of Congress Challenge Libyan War in Federal Court*, JONATHAN TURLEY: RES IPSA LOQUITUR ("THE THING ITSELF SPEAKS") (June 15, 2011), http://jonathanturley.org/2011/06/15/members-of-congress-challenge-libyan-war-in-federal-court/ (discussing representation of Members challenging the intervention by President Obama in the Libyan War).

76 President Barack Obama's State of the Union Address, January 28, 2014 ("Some [of my proposals] require Congressional action, and I'm eager to work with all of you. But America does not stand still – and neither will I. So wherever and whenever I can take steps without legislation to expand opportunity for more American families, that's what I'm going to do.")

in these two years will pale in comparison to the long-term costs for this institution and for the Constitutional system as a whole.

Despite our petty failings and partisan impulses, a single system of governance has brought us through wars, depression, civil unrest, and other towering challenges. However, our system has been preserved under a certain covenant of faith from all citizens. It is that very covenant that is affirmed every time a president or a Member of Congress takes the oath of office. There is no improvisation option for Congress. There is no circumvention option for presidents. What we are witnessing today is a crisis of faith in our system despite its unparalleled and proven success. People have grown impatient with the constraints of the constitutional system, constraints which can seem quaint or antiquated when compared to pressing problems of health care or immigration or the environment. It is tempting to embrace rule by a single person who offers to govern alone to get things done. However, this is the very Siren's call that our Founders warned us to resist. We remain a nation of laws and we have a court system designed to resolve such controversies. That is precisely where this authorization would take us and it is where these questions should be answered.

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