Written Statement

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

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

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

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

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

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

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

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

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

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

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

I. THE CONSTITUTIONAL ELEMENTS OF STANDING

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

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

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

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

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

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

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

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

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

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

[5] *Id.*

II. INSTITUTIONAL INJURY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Institutional Injury Cases

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

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

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

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

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

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

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

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

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

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

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

Raines, 521 U.S. at 816.

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

[11] *Id.* at 829.

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

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

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

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

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

Second, the institutional injury alleged in *Raines* did not rise to the level of concreteness of *Coleman v. Miller*[16]—the Court's one prior decision recognizing legislator standing for institutional injury. As the *Raines* Court put it, "There is a vast difference between the level of vote nullification at issue in *Coleman* and the abstract dilution of institutional legislative power that is alleged here."[17]

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

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[15] *Id.* at 824.

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

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

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

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

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

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

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

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[19] *Id.* at 438.

[20] *Id.*

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

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

[23] 8 U.S.C. § 1227(a).

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

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

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

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

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

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

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

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

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

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

a. Non-subpoena cases

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

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

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

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

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

[29] *Id.* at 20.

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

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

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

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

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

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

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

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

[33] *Id.* at 113.

[34] *Id.*

[35] *Id.* at 116.

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

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

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

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

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

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

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

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

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

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

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

b. Subpoena cases

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

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

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

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

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

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

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

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

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

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

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

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

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[47] *Id*. at 387.

[48] *Id.*

[49] *Id.* at 389.

[50] *Id.* at 388.

[51] *Id.*

[52] *Id.* at 391.

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

[54] *Id.* at 395.

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

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

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

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

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

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

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

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

[58] *Id.* at 63.

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

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

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

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

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

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

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

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

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

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

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

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

[66] *Id*. at *4.

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

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

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

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

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

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

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

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

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

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

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

[70] *Id.* at *8.

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

[72] *Id.*

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

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

III. PRUDENTIAL FACTORS IMPORTANT IN INSTITUTIONAL INJURY LAWSUITS

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

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

A. Explicit Authorization for Litigation

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

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

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

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

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

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

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

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

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

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

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

[77] *Id.* at 11.

[78] *Id.* at 11.

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

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

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

B. No Private Plaintiff is Available

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

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

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

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

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

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

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

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

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

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

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

[84] *Id.* at 827.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. No Legislative "Self-Help" is Available

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

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

[97] 8 U.S.C. §1227(a).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[106] *Id.* at 23.

[107] *Id.*

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

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

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

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

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

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

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

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

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

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

[113] *Id.*

[114] *Id.* at 116.

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

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

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

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

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

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

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

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

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

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

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

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

[118] *Id.*

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

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

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

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

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

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

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

IV. CONCLUSION

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

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

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

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

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

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

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