

**Written Statement**

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***“Enforcing the President’s Constitutional Duty  
to Faithfully Execute the Laws”***

**Committee on the Judiciary  
United States House of Representatives**

**2141 Rayburn House Office Building**

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Chairman Goodlatte, Ranking Member Conyers, and members of the Judiciary Committee, my name is Jonathan Turley and I am a law professor at George Washington University where I hold the J.B. and Maurice C. Shapiro Chair of Public Interest Law. It is an honor to appear before you today to discuss the available means of Congress to compel the President to faithfully execute the law in accordance with Article II of the United States Constitution. U.S. CONST. art. II, § 3, cl. 4.

I recently testified before this Committee on the history and function of the separation of powers in our system.<sup>1</sup> I also discussed how, in my view, President Obama has repeatedly violated this doctrine in the circumvention of Congress in areas ranging from health care to immigration law to environmental law. I will not repeat that discussion here because this hearing is not about the existence of such violations but the possible corrective measures that can be taken in light of those violations.

Given the issues at stake in this debate, it is vital that we speak plainly about the current conflicts between the Executive Branch and the Legislative Branch. We are in the midst of a constitutional crisis with sweeping implications for our system of government. There has been a massive gravitational shift of authority to the Executive

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<sup>1</sup> The President's Constitutional Duty to Faithfully Execute the Laws *Before the H. Comm. on the Judiciary*, 113th Cong. (2013) (statement of Jonathan Turley, Professor, The George Washington University Law School). I also testified in 2012 on the controversy surrounding these recess appointments. See *Exec. Overreach: The President's Unprecedented "Recess" Appointments Before the H. Comm. on the Judiciary*, 112th Cong. 35-57 (2012) (statement of Jonathan Turley, Professor, The George Washington University Law School). See also Jonathan Turley, *Recess Appointments in the Age of Regulation*, 93 B.U. L. REV. 1523 (2013); Jonathan Turley, *Constitutional Adverse Possession: Recess Appointments and the Role of Historical Practice in Constitutional Interpretation*, 2103 WIS. L. REV. 965 (2013); Jonathan Turley, *The Rise of the Fourth Branch of Government*, WASH. POST (May 24, 2013), at C1.

Branch that threatens the stability and functionality of our tripartite system. To be sure, this shift did not begin with President Obama. However, it has accelerated at an alarming rate under this Administration. These changes are occurring in a political environment with seemingly little oxygen for dialogue, let alone compromise. Indeed, the current anaerobic conditions are breaking down the muscle of the constitutional system that protects us all. Of even greater concern is the fact that the other two branches appear passive, if not inert, as the Executive Branch has assumed such power.

As someone who voted for President Obama and agrees with many of his policies, it is often hard to separate the ends from the means of presidential action. Indeed, despite decades of thinking and writing about the separation of powers, I have had momentary lapses where I privately rejoiced in seeing actions on goals that I share, even though they were done in the circumvention of Congress. For example, when President Obama unilaterally acted on greenhouse gas pollutants, I was initially relieved. I agree entirely with the priority that he has given this issue. However, it takes an act of willful blindness to ignore that the greenhouse regulations were implemented only after Congress rejected such measures and that a new sweeping regulatory scheme is now being promulgated solely upon the authority of the President.<sup>2</sup> We are often so committed to a course of action that we conveniently dismiss the means as a minor issue in light of the goals of the Administration. Many have embraced the notion that all is fair in love and politics. However, as I have said too many times before Congress, in our system it is often more important *how* we do something than *what* we do. Priorities and policies (and presidents) change. What cannot change is the system upon which we all depend for our rights and representation.

Convenience has long been the enemy of principle in politics. It is not enough to refer to the value of a program to justify its extraconstitutional means. Such constitutional relativism cuts the entire system free of its moorings; leaving the system adrift in a sea of politics where the ability to act is treated as synonymous with the authority to act. There is no license in our system to act, as President Obama has promised, “with or without Congress”<sup>3</sup> in these areas. During periods of political division, compromise is clearly often hard to come by. That reflects a divided country as a whole. Such opposition cannot be the justification for circumvention of the legislative branch. Otherwise, the separation of powers would only be respected to the extent that it serves to ratify the wishes of a president—leaving only the pretense of democratic

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<sup>2</sup> In fairness to the Administration, the Supreme Court in 2007 ruled that the 1970 Clean Air Act allowed, if not required, actions on greenhouse gases if they were found to be harmful to the public health. *See Massachusetts v. E. P. A.*, 549 U.S. 497 (2007). The Supreme Court is currently considering new and potentially sweeping regulations issued in *Utility Air Regulatory Group v. E. P. A.* concerning stationary greenhouse gas emitters, such as coal-fueled power plants. This makes the greenhouse gas regulations more defensible but it remains problematic to have such sweeping rules issued without congressional involvement. I have written about the shift of governing authority to the federal agencies as an emerging “fourth branch” within our system. *See supra* n. 1.

<sup>3</sup> David Horsey, *State of the Union: Congress Will Stall Obama's "Year of Action,"* L. A. TIMES, January 29, 2014.

process. Circumvention is used to avoid any compromise and instead to force victory on the unilateral terms of one branch.

As I will discuss, the Framers gave the Congress a variety of means to protect its institutional authority. However, these means have lost much of their vitality due to the changes in the federal government. Moreover, the Framers never expected Congress to be solely responsible for the maintenance of the separation of powers. The current crisis is the result not simply of executive overreach but also of judicial avoidance in the face of that growing encroachment. The courts are now absent—without constitutional leave—in the midst of one of the most fundamental conflicts in the history of our country. That will make corrective measures all the more important (and all the more difficult) for Congress.

### **I. Judicial Avoidance and the Loss of Judicial Review in Separation Conflicts**

The very fact that we are having this hearing captures how far we have drifted from our original constitutional origins. For much of our history, the Congress has been a rock of representative power—balancing the authority of presidents with its own authority to force deliberation and compromise in national goals. This is precisely what the Framers foresaw in delineating the legislative powers in Article I. Yet, today, Congress often appears feckless and uncertain as to how it can assert its authority when openly circumvented or ignored by a president. It is understandable that many of us are left wondering how we came to this.

The answer to that question is not the obvious political divisions in our country. While politicians often describe their opponents as being unprecedented in their obstructionist or hostile attitudes, politics in the United States has always been something of a blood sport—literally. At the start of our Republic, the Republicans and Federalists were not “trying to kill one another” in the contemporary figurative sense. They were trying to kill each other in the literal sense through measures like the Alien and Sedition Acts. Thomas Jefferson once described the Federalist period as “the reign of the witches.” In other words, this is not the first President to encounter a hostile minority party or even an entirely hostile Congress. Our system was designed to force opposing factions to deal and compromise with each other. It is a system designed for political division, not political consensus.

Accordingly, I do not subscribe to the common view that our current dysfunctional government is solely the result of political division and deadlock, which is nothing new in our system. While never mentioned in analysis of our current controversies, I believe considerable blame rests not with the “political branches” but with the Judicial Branch. By refusing to review many separation-based conflicts, the Court has left these controversies to simmer and has left the branches to use raw power moves to block each other. While once described as “the least dangerous branch,”<sup>4</sup> it has re-made itself into the least relevant branch in separation of powers cases. The self-

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<sup>4</sup> THE FEDERALIST NO. 78 (Alexander Hamilton).

removal of the courts from these conflicts has served to prolong and deepen conflicts between the political branches.

The irony is that in the last few decades the Supreme Court has removed itself from separation of powers cases . . . in the name of separation of powers. Indeed, in its decision in *Raines v. Byrd*, the Court insisted that “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.”<sup>5</sup>

Some of the most important questions to the Framers, like the declaration of war,<sup>6</sup> have been avoided by the courts under claims that the judiciary is somehow strengthening the separation of powers by refusing to reinforce the lines of separation. It is akin to fire departments allowing houses to burn under the claim that citizens are best source for fire protection. Thus, the reasoning goes, if “only you can prevent wildfires,” then only you can put them out. The policing of the lines of separation is the single most important duty of the courts since the separation of powers was designed as a protection of individual liberty. It is the concentration of authority in any one branch that threatens individual rights. While checks and balances exist, the protection of the structural integrity of the system (as with federalism guarantees) rests with the courts as neutral arbiters. In these cases, the courts are not asked to resolve political questions but are instead asked to resolve conflicts regarding the process through which such questions are resolved.

The removal of the federal courts from the equation in these conflicts has placed even greater stress on the system of checks and balances. However, the measures available to Congress are no substitute for judicial review, particularly given the changes in our federal system. As I have discussed in earlier writings, a fourth branch has emerged in our tripartite system that is highly insulated and independent from Congress. Today, the vast majority of “laws” governing the United States are not passed by Congress but are issued as regulations. Recently, this Supreme Court added to this insulation and authority with a ruling that agencies can determine their own jurisdictions—a power that was previously believed to rest with Congress. In his dissent in *Arlington v. FCC*, Chief Justice John Roberts warned: “It would be a bit much to describe the result as ‘the very definition of tyranny,’ but the danger posed by the growing power of the administrative state cannot be dismissed.”<sup>7</sup> With this shift toward agency power, Congress is practically limited in the measures that it can take to limit

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<sup>5</sup> 521 U.S. 811, 820 (1997).

<sup>6</sup> For the record, I represented members of both parties challenging the assertion of unilateral war powers, but we were unable to even secure a hearing from the federal court which avoided the question on standing grounds. See Jonathan Turley, *Members of Congress Challenge Libyan War in Federal Court*, JONATHAN TURLEY: RES IPSA LOQUITUR (“THE THING ITSELF SPEAKS”) (June 15, 2011), <http://jonathanturley.org/2011/06/15/members-of-congress-challenge-libyan-war-in-federal-court/> (discussing representation of members challenging the intervention by President Obama in the Libyan War).

<sup>7</sup> 133 S. Ct. 1863, 1879 (2013).

Executive action. In refusing to adjudicate separation of powers questions, courts often list these checks like some self-authenticating mantra: the power of the purse, oversight jurisdiction, and, of course, impeachment. On closer examination, however, the new realities of federal governance have diminished the viability of these measures for checking Executive Power in the United States.

## II. The Erosion of Checks on Executive Power Within the Modern Madisonian System

The classic check on executive over-reaching is the power of the purse. While the President may control the machinery of the state, it is Congress that supplies the gas needed to run those machines. However, the idea of the purse strings as a meaningful check on executive power is often presented in highly generalized and unrealistic terms. Congress is unlikely to cause a cascading failure by cutting off all of the funding for an agency or even a subagency office. More importantly, the Executive Branch routinely moves billions of dollars around in discretionary or undesignated funding. Cutting off the funding of a given part of the government does not have immediate impacts and may in fact not prevent funding as intended.

The Obama Administration has shown how the power of the purse has diminished under modern fiscal systems. Consider the health care controversy. As the *Washington Post* reported, “[t]he Obama administration plans to use \$454 million in Prevention Fund dollars to help pay for the federal health insurance exchange. That’s 45 percent of the \$1 billion in Prevention Fund spending available [in 2013].”<sup>8</sup> Even leading Democratic members denounced this act as “a violation of both the letter and spirit of this landmark law.”<sup>9</sup> However, that open disregard of the power of the purse resulted in nothing of consequence for the Administration. Congress was simply circumvented and the President effectively self-appropriated federal funds for his own priorities. Constitutional objections amounted to little more for the President than what Macbeth described as voices “full of sound and fury,/ Signifying nothing.”<sup>10</sup>

This was of course not the first such shifting of funds to support unilateral action. Indeed, when we challenged the Libyan War on behalf of Democratic and Republican members, we showed how the Administration funded an entire military campaign by shifting billions in money and equipment without the need to ask Congress for a dollar. President Obama not only said that he alone would define what is a war in circumvention of the declaration power but also unilaterally funded the war as just another discretionary

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<sup>8</sup> Sarah Kliff, *The Incredible Shrinking Prevention Fund*, WASH. POST, April 9, 2013.

<sup>9</sup> Statement of Sen. Tom Harkin, *The Importance of the Prevention Fund to Save Lives and Money*, May 7, 2013 (“Mr. President, I was deeply disturbed, several weeks ago, to learn of the White House’s plan to strip \$332 million in critical funding from the Prevention and Public Health Fund and to redirect that money to educating the public about the new health insurance marketplaces and other aspects of implementing the Affordable Care Act.”)

<sup>10</sup> William Shakespeare, *MACBETH*, V.v.27–28.

expense. Federal appropriations have become so fluid and discretionary spending so lax that presidents are now more insulated than ever before from the threat of de-funding. This is not to say that the power of the purse is no potential hold on Administrations. Congress needs to be more specific on the use of funds and reduce the degree to which funds are given for discretionary uses, particularly during periods of circumvention and tension.

The other oft-cited power checking the Executive Branch is direct legislative action and oversight authority. Once again, however, recent years have shown how presidents can insulate themselves from legislative inquiry into questions of misconduct or misappropriation. Recently, the Administration refused to turn over material to oversight committees and the House moved to hold Attorney General Eric Holder in contempt.<sup>11</sup> The Administration responded by blocking any prosecution of Attorney General Holder by the United States Attorney for the District of Columbia. Thus, while the Executive Branch has long insisted that only it can prosecute such offenses, it has used this authority to block its own investigation or prosecution. The Administration then tried to block any lawsuit by Congress to enforce a subpoena against Holder.<sup>12</sup>

I recently published two studies on the diminishment of congressional power in the context of the circumvention of congressional power over federal appointments.<sup>13</sup> I have argued that appointments fights have become more intense because of the diminishing checks on executive power and the rise of a fourth branch within the federal agencies. Faced with the refusal of agencies to answer questions or supply documents, appointments have become a key avenue to resolve some of these disputes for Congress. It is a poor vehicle, to be sure, but it is one of the remaining measures for Congress to have an immediate impact on executive action. I previously testified that I believe that President Obama clearly violated the Constitution in his recess appointment of Richard

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<sup>11</sup> Sari Horwitz, *Justice Department Confirms It Will Not Prosecute Holder*, WASH. POST (June 29, 2012), [http://www.washingtonpost.com/world/national-security/justice-department-confirms-it-will-not-prosecute-holder/2012/06/29/gJQAbHgACW\\_story.html](http://www.washingtonpost.com/world/national-security/justice-department-confirms-it-will-not-prosecute-holder/2012/06/29/gJQAbHgACW_story.html); Eyder Peralta, *Justice Will Not Prosecute Holder for Contempt of Congress*, NPR (June 29, 2012), <http://www.npr.org/blogs/thetwo-way/2012/06/29/156002660/justice-will-not-prosecute-holder-for-contempt-of-congress>.

<sup>12</sup> See *Comm. on Oversight and Gov't Reform v. Holder*, 2013 WL 5428834 (D.D.C. Sept. 30, 2013). In *Holder*, the House Committee on Oversight and Government Reform sought to enforce a subpoena seeking information related to the "Fast and Furious" operation by the Bureau of Alcohol, Tobacco and Firearms. Notably, the House of Representatives then passed authorization of the Chairman of the Oversight and Government Operations Committee to initiate the civil lawsuit and the court refused to deny the lawsuit on standing grounds. The Court ruled that "[t]o 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." *Id.* at \*8.

<sup>13</sup> See n. 1.

Cordray to serve as the first Director of the Consumer Financial Protection Bureau and three individuals to the National Labor Relations Board.<sup>14</sup> While Congress holds the power of the purse, the exercise of that power to cut off funding to agencies that administer critical social programs or perform critical social functions is considered by many to be the ultimate “nuclear option.” The shared appointment power, by contrast, offers Congress a less drastic method by which it may express its opposition to presidential power or policy. The Cordray controversy is now before the Supreme Court, in *NLRB v. Noel Canning*. However, regardless of how the Court rules, I believe that Congress needs to go further in reinforcing the appointments power to rebalance the tripartite system.

The final authority often cited by courts is the impeachment power. As one of those who testified during the Clinton impeachment and the lead counsel in the most recent judicial impeachment case, I do not take this power lightly, and I strongly disagree with those who treat it as a readily available check on presidential abuse. Let me be clear. In my view, some actions of recent presidents—from the approval of torture to the unilateral commitment of our country to war—should raise questions of impeachment. However, the courts have enabled presidents in these abuses by treating the issues as political questions or rejecting challenges to such authority. As a result, presidents have a plausible claim to be acting under their interpretation of past cases. I do not believe that President Obama has committed impeachable offenses in these areas even though I believe that he has knowingly and repeatedly violated the Constitution. The recess appointment controversy is a good example. As I stated in earlier testimony, I was astonished by the low quality of the opinion issued by the Office of Legal Counsel supporting those recess appointments. However, the prior avoidance by courts created a basis (albeit a rather thin one) to claim a good faith interpretation of the broader scope of the President’s recess appointment powers.

The solution to this crisis will not be found in the impeachment clause. What is striking, however, is how the courts have elevated impeachment as a recourse by denying the more appropriate and less traumatic avenue of judicial review. No system can long survive with impeachment as the critical means for deterring executive abuse. It is akin to running a nuclear power plant with no safeguards and merely an “on or off” switch. That will not bring stability to a system that is already dangerously out of kilter.

### **III. Restoring Balance in a Tripartite System: Options for Congress in Combating Executive Usurpation of Legislative Authority**

The current threat to legislative authority in our system is comprehensive—spanning from the misappropriation of funds to the circumvention of appointments to negation of legislative provisions. Any solution, therefore, must also be comprehensive.

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<sup>14</sup> See *Exec. Overreach: The President’s Unprecedented “Recess” Appointments Before H. Comm. on the Judiciary*, 112th Cong. (2012) (statement of Jonathan Turley, Professor); see also Jonathan Turley, *Recess Appointments and The Abuse of Power*, USA TODAY, Feb. 15, 2012.

For that reason, the current proposals should not be considered in isolation but as part of a broader package of legislative countermeasures. The proposed legislation on legislative or member standing is particularly of interest to me, as I stressed in my earlier testimony.

#### A. Member Standing

I have repeatedly testified before Congress on the single most valuable change that would counter the usurpation of legislative authority: legislative or member standing. I have long advocated the right of members to seek judicial review in alleged violations of the separation of powers. While I understand the reluctance of courts to consider political questions, a separation-based challenge is not a political but a structural question that is committed to the courts. Indeed, “standing” does not appear anywhere in the Constitution as a term or even by reference. It is a creation of the courts and has radically changed over the years to create a growing barrier for access to the courts. We now face a situation where major alleged violations of the Constitution are raised but there is no one who clearly has the standing to force judicial review.

The classic elements for standing are an injury-in-fact, a showing of an injury that is fairly traceable to the defendant's conduct, and redressability by the court. It is the first of these elements that has been the source of the most difficulty for members in establishing legislative standing.

There are certainly good faith disagreements on the scope of standing that should be allowed given the limitation under Article III of review of only “cases” and “controversies,”<sup>15</sup> but the wholesale removal of the courts from many separation controversies, in my view, was never envisioned by the Framers. The Court has allowed a narrow window for standing for members in cases involving personal injury or institutional injury.<sup>16</sup> Personal injury claims are always preferred in litigation on behalf of members as they are the most likely to prevail (as with citizens with personal injuries). However, they also tend to be the most limited in scope and relief. For example, in *Powell v. McCormack*,<sup>17</sup> Congressman Adam Clayton Powell sued (with a small number of constituents) over his exclusion from the House chamber after a scandal involving expense accounts. The Supreme Court found that Powell had standing based on his personal injury<sup>18</sup> and that his exclusion from the House presented a justiciable case or controversy, and it has subsequently made clear that *Powell* is a case involving a private legislator injury.

It is the second category of institutional injury that holds the most promise for Congress in separation cases, albeit limited given the overtly hostile attitude of the

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<sup>15</sup> U.S. CONST. art. II, § 2 (“The judicial Power shall extend to all Cases in Law and Equity, arising under this Constitution, and Treaties made . . . under their Authority . . . ;— to Controversies to which the United States shall be a Party; — to Controversies between two or more States . . .”).

<sup>16</sup> *Chenoweth v. Clinton*, 997 F. Supp. 36, 38–39 (D.D.C. 1998).

<sup>17</sup> 395 U.S. 486 (1969).

<sup>18</sup> This was later amplified as a distinction in *Raines*. See *Raines*, 521 U.S. at 821.



current federal bench.<sup>19</sup> *Raines*, however, adopted a severely limited view of such injury. In that case, four senators and two House members challenged the Line Item Veto Act. The low number of members clearly undermined the challenge. The Court viewed these members as having lost in Congress and as advancing a type of “sore losers” claim.<sup>20</sup> Much of the challenge was based on “a type of institutional injury (the diminution of legislative power) which necessarily damages all Members of Congress and both Houses of Congress equally.”<sup>21</sup> The Court, however, saw any diminishment as being experienced by *all* members and thus too defused for standing.<sup>22</sup> It also did not help that the members in *Raines* were injured by their own colleagues as opposed to the unilateral action of the President.<sup>23</sup> The greatest difficulty facing a legislative solution to this morass is that the Court has actively sought to bar lawsuits by basing many of its decisions on its interpretation of Article III as opposed to prudential considerations.<sup>24</sup> Congress can alter standing under prudential principles but cannot alter the constitutional meaning of Article III.<sup>25</sup> Absent a constitutional amendment, a change in the interpretation of Article III can only come from the Court itself.<sup>26</sup>

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<sup>19</sup> This hostility was evident in the rejection of our challenge to the Libyan War in *Kucinich v. Obama*, 821 F. Supp. 2d 110 (2011).

<sup>20</sup> I have long disagreed with this view because it is possible for a majority of Congress to relent to unconstitutional acts. Indeed, a Congress can be controlled by a President’s party or simply cowed by his popularity. The fact that a few members challenge the unconstitutional act does not diminish the argument on the merits. Indeed, such control of a president reflects the greatest danger in a democratic system—a popular but potentially authoritarian leader.

<sup>21</sup> *Raines*, 521 U.S. at 821.

<sup>22</sup> I disagree with that view and fail to see why a generally experienced diminishment of power reduces its viability for standing. This view reminds one of the standing for public nuisance where an individual with clear injury is denied if everyone else experienced the same substantial injury. The problem is that in public nuisance, government agencies can sue and there remains private nuisance actions. In separation cases, the denial of these members leaves a president often unchallenged in the usurpation of legislative authority.

<sup>23</sup> A similar problem was faced in *Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999), *cert. denied* 529 U.S. 1012 (2000), where a handful of members sought to enjoin the President’s implementation of the American Heritage Rivers Initiative. The five members sought to legislatively stop the initiative, but the bill was effectively killed by their colleagues.

<sup>24</sup> See generally *Dep’t of Commerce v. House of Representatives*, 525 U.S. 316, 328–29 (1999).

<sup>25</sup> See *Raines*, 521 U.S. at 820 n.3.

<sup>26</sup> The Court drew this distinction in the recent decision in *Windsor*, observing that “Rules of prudential standing, by contrast, are more flexible ‘rule[s] . . . of federal appellate practice,’ *Deposit Guaranty Nat. Bank v. Roper*, 445 U. S. 326, 333 (1980), designed to protect the courts from ‘decid[ing] abstract questions of wide public significance even [when] other governmental institutions may be more competent to

One obvious area of action is to empower institutional claims to be taken on behalf of Congress or a house or even a committee. Such a committee was found to have standing in *Committee on the Judiciary v. Miers* on the basis of institutional injury. Notably, however, this was to enforce a congressional subpoena where the committee was “expressly authorized by the House of Representatives as an institution.”<sup>27</sup> Standing arguments can be based on actions taken by a president to nullify the vote of members. However, the Supreme Court in *Raines* warned that it would not allow claims that it considers to be based on “abstract and widely dispersed” injuries.<sup>28</sup>

The strongest claim is found in acts that strip legislators of their power to legislate. It has to be an action that denies any legislative response because it nullifies the power of Congress. In *Kucinich*, we argued (among other points) that the circumvention of Congress in declaring or approving of war represented such nullification, but the district court refused to even give the members a hearing on the question.<sup>29</sup> This was the same result seen in *Campbell v. Clinton*,<sup>30</sup> where the D.C. Circuit denied standing to thirty-one members of the House who opposed the committal of troops by President Clinton in Kosovo as a violation of both the War Powers Act and the War Powers Clause of the Constitution.

Legislative standing is most compelling, as noted in *Committee on the Judiciary v. Miers*, when it “ha[s] been expressly authorized by the House of Representatives as an institution” to bring the suit by House resolution.<sup>31</sup> Such a case was presented in *Coleman v. Miller* where twenty-one Kansas senators sued under a mandamus action to prevent authentication of Kansas's ratification of a proposed federal Child Labor Amendment.<sup>32</sup> Notably, in a forty-member house, this was a majority of members and the Kansas senate had rejected the amendment by a 20-20 vote. The Court recognized that the claim represented a direct nullification claim and that the members had presented

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address the questions and even though judicial intervention may be unnecessary to protect individual rights.” *United States v. Windsor*, 133 S. Ct. 2675, 2686 (2013) (quoting *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 333 (1980) and *Warth v. Seldin*, 422 U.S. 490, 500 (1975)).

<sup>27</sup> Such subpoena cases tend to have the strongest track record but could be viewed as a narrow ground for more general separation-based challenges. See *United States v. Am. Tel. & Tel. Co.*, 419 F. Supp. 454, 458 (D.D.C. 1976); *Ashland Oil, Inc. v. FTC*, 548 F.2d 977 (D.C. Cir. 1976); *In re Beef Indus. Antitrust Litig.*, 457 F. Supp. 210, 212 (N.D. Tex. 1978).

<sup>28</sup> *Raines*, 521 U.S. at 826.

<sup>29</sup> *Kucinich*, 821 F. Supp. at 120 (ruling that *Raines* nullification “necessitates the absence of a legislative remedy.”).

<sup>30</sup> 203 F.3d 19 (D.C. Cir.), cert. denied 531 U.S. 815 (2000).

<sup>31</sup> In *Miers*, the U.S. District Court for the District of Columbia held that the Committee had standing to sue to enforce a congressional subpoena in part because it “had been expressly authorized by the House of Representatives as an institution” to bring the suit.

<sup>32</sup> *Coleman v. Miller*, 307 U.S. 433 (1939).

a "plain, direct and adequate interest in maintaining the effectiveness of their votes."<sup>33</sup>

Legislative standing is a modest extension of standing to a relatively small group, but it would have a pronounced impact on separations controversies. Standing limitations are often defended by the courts under the theory that those with the most at stake in disputes are the most likely to present the strongest arguments. When it comes to separations conflicts, members have such resources and such an interest to present strong cases. To use colloquial parlance, they have "skin in the game" when it comes to the separation of powers.

The problem with securing legislative standing is the specific grounds laid out by the Supreme Court for its past decisions. Any change in the Article III limitations would have to come from that same Court. The only alternative would be a constitutional amendment. The situation is, in my view, so serious that I believe we may have to consider such a move, even though I have long opposed constitutional amendments as a general principle. I have been reluctant to suggest such a resolution because I believe the Court is dead wrong on standing and that this is a barrier created by the courts rather than the Constitution. These decisions have overwhelmingly tended to favor the expansion of executive power. I still hope to see a correction of these decisions and much prefer any alternative to a constitutional amendment, which I readily admit is a difficult proposition.

The effort reflected in H. Res. 442 to create institutional standing is commendable. Despite the hostile reception given to past legislative standing efforts, it is important for Congress to continue to press the courts for access on separation of powers questions. Indeed, the bill is written not as a challenge to the merits of the regulatory changes but to the means used for those changes. Absent individual injury of a member, such institutional challenges are the only option short of a constitutional amendment. While I would alter the language of the bill, the premise remains sound as an effort to secure judicial review of a violation of the separation of powers.<sup>34</sup>

The current controversies of the faithful execution of the laws contain some elements that should be emphasized in any legislative record. First, to the extent that any lawsuit would be authorized by statute on behalf of the institution, it would be substantially advanced compared to prior groups of aggrieved members. Second, such authorization would reflect the view that Congress is the most aggrieved party and the

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<sup>33</sup> *Coleman*, 307 U.S. at 438; see also *Kerr v. Hickenlooper*, 880 F. Supp. 2d 1112, 1131 (D. Colo. 2012).

<sup>34</sup> The proposed H.R. 3857 takes the same general approach in trying to lay the groundwork for institutional standing and adds the rulemaking element and specified vote requirements. Once again, I commend the premise though I would alter some of the language. The law sweeps more broadly and would more aggressively deal with the rise of the fourth branch within the tripartite system. However, it would also present a more difficult foundation in the likely challenge before the courts since it extends to a challenge of any regulation or act of "agency administrative guidance." That could be challenged as intruding too far into executive actions by members and could reinforce the concern of some judges of a "slippery slope" in allowing member standing. At this time, a more limited bill might be advisable given the hostility of the Court to separation-based challenges by members.

best party to advance these arguments. Indeed, there may not be any readily apparent private party available in some of these actions. Third, since the President is nullifying provisions in the law and shifting funds without authorization, he has already ignored the authority of Congress to dictate such matters. It hardly seems logical to require Congress to pass additional laws to address the negation of prior laws that were ignored. While it could be argued that Congress could still retaliate by denying appropriations in their entirety, the White House has already moved funds dictated to other purposes. That presents one of the stronger nullification records of prior conflicts between the branches.

## **B. Legislative Action**

The loss of legislative authority is not only attributable to the expansion of presidential powers but also to the rise of a fourth branch of federal agencies. Congress is becoming marginalized in the actual laws governing citizens. Most of the legal obligations faced by citizens now come from hundreds of thousands of regulations that are promulgated without direct congressional action and outside the system created by the Framers to force compromise and consensus in a representative system. There have clearly been great benefits associated with this administrative system, and modern government would be impossible without some agency deference. However, a fundamental change is occurring in our system with relatively little deliberation by Congress, which has lost the most from the emergence of a fourth branch. In my view, greater control has to be asserted by Congress in promulgation of large new regulatory schemes. This would require more restrictive language on agency authority and, by extension, would require more work (and probably staff) in the legislative branch in playing a more active role in addressing more changes as legislative rather than solely agency matters.

Congress can take meaningful action to require congressional review and approval of major regulations like the greenhouse regulations and immigration regulations. For that reason, the change proposed in H.R. 3973 would have the benefit of forcing greater disclosure and discussion on new policies of nonenforcement. The law already establishes this duty for the Justice Department and would extend it more broadly. It would also extend the grounds for such reports beyond constitutional objections by the Executive Branch to the enforcement of a law. Obviously, enforcement of this law as currently written, let alone in its amended form, remains a problem. The Justice Department has already shown a willingness to block contempt cases against Administration officials. Putting that aside, as someone who has long warned about the marginalization of Congress in the new model of federal governance, any required disclosures of such policies can only assist the Legislative Branch. Moreover, it is hard to see the argument against such disclosures. Too often, Congress has been informed of major changes by leaks to the media in what has become an increasingly pedestrian role for the Legislative Branch.

I also commend the focus of some in Congress on the recent controversies over the withdrawal from the defense of federal laws like the Defense of Marriage Act (“DOMA”). Once again, I share President Obama’s opposition to DOMA and I have strongly supported same-sex marriage. However, I was appalled by the confusion and uncertainty over standing created by the withdrawal of the defense of the laws. It did not

serve the legal process to obscure the important legal issues in the recent Supreme Court cases with questions of standing and representation. I understand Attorney General Eric Holder's position that he felt that he could not ethically support the law, even though the Administration once did defend the laws. However, the solution, in my view, is not to abandon the law, let alone the Legislative Branch. DOMA was still a law passed by Congress and signed by President William Clinton. As with the contempt controversy, one cannot assert absolute right to represent the Legislative Branch and then refuse to defend laws. Holder should have appointed outside counsel to defend the law in the name of the government if he found the task to be ethically barred. While I support the Administration's general position, there were good faith arguments on both sides of the DOMA question—as was the case with the California referendum. We should all want a full and fair consideration of those arguments without artificial limitations presented by litigation abandonment.

In *United States v. Windsor*, the Court was divided on the standing of members to defend DOMA with both Chief Justice Roberts and Associate Justice Scalia rejecting standing arguments by the House of Representatives' Bipartisan Legal Advisory Group (BLAG). The majority, however, found sufficient Article III standing despite the fact that the Obama Administration abandoned defense of the federal law. It found prudential reasons for accepting the case to guarantee adversarial process and other interests.<sup>35</sup> Notably, however, standing was rejected in *Hollingsworth v. Perry* after the California Attorney General withdrew from the defense of the state referendum. Just yesterday, Attorney General Eric Holder encouraged state Attorney Generals to follow this same course in abandoning defense of their own state laws.<sup>36</sup> Given the division over standing in *Windsor* and the denial of standing in *Hollingsworth*, General Holder's advice is troubling and inimical to the legal process. There is a difference between refusing to personally defend a law and leaving a law undefended. The interests of justice demand that courts are given an adversarial presentation of arguments—a requirement that is openly obstructed when the government withdraws from representation and fails to appoint individuals to defend a law.

### C. Appointments

I will not repeat my earlier testimony or writings on reasserting congressional power over appointments. However, regardless of what the Supreme Court rules this

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<sup>35</sup> Justice Kennedy specifically noted “the prudential problems inherent in the Executive's unusual position” and the risk that the abandonment of the defense of the law would deny the Court of a “real, earnest and vital controversy.” *Windsor*, 133 S. Ct. at 2687. The Court held that “prudential considerations demand that the Court insist upon ‘that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.’” *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

<sup>36</sup> Evan Perez, *Eric Holder Becomes An Activist Attorney General*, CNN, Feb. 25, 2014.

term, Congress should try to reach consensus on how to respond to future circumventions on recess appointments. First, one of the most dangerous forms of recess appointments remains judicial recess appointments. Such appointments have existed from the earliest period of the Republic. Indeed, the first five Presidents made thirty-one such appointments, including five to the Supreme Court. However, such appointments were necessitated by the long congressional recesses and a limited number of federal judges (and a six-person Supreme Court). That is not the case today. Modern judicial appointments are often a form of retaliation against Congress for refusing to confirm nominees and undermines the guarantee under Article III for independent judges. A recess-appointed judge is dependent on the Administration to put forward his or her name for a later confirmation. That individual is also aware that any decisions rendered during the recess appointment could be used against him or her. Congress should maintain an unwavering rule that anyone given a recess appointment to a judicial position would be categorically rejected for subsequent confirmation.

Second, the Congress should maintain the same rule for an intrasession recess appointments or appointments during three-day recesses. If the Court does not rule such appointments to be unconstitutional, Congress should resolve that any such nominees would be barred from later confirmation to that post. Third, Congress should, at a minimum, bar any later confirmation to any nominee who received a recess appointment after being previously submitted to Congress in the earlier session. Indeed, I believe that no recess appointment should be allowed where a vacancy existed in the prior term (as opposed to arising during a recess). Since I view appointments as one of the few remaining avenues for Congress to influence federal agencies, I would encourage a bright-line rule on such recess appointments. Congress could temper this rule with a formal waiver of the bar on confirmation if, before the end of the prior session, it passed a resolution acknowledging that certain nominees (who did not receive a final vote) could be legitimately given a recess appointment. This resolution would merely acknowledge that the nominees were not rejected (or filibustered) on the merits and Congress would not treat the appointment as a circumvention of its authority. Obviously, nothing would stop a president from making abuse appointments, subject to court challenges. However, if Congress were to maintain this principled line regardless of the party of the president, it would greatly reduce the abuse of this Clause. If nominees were truly left unconfirmed due to administrative or logistical problems, the two branches could agree that those nominees would not be barred due to any recess appointment.

Congress should consider a comprehensive resolution on future recess appointments. While this will not be binding on future Congresses, it could constitute a bipartisan policy that would guide future Congresses. It would also put future presidents on notice that the abuse of recess appointment powers will have consequences. If the Court does find that President Obama violated the Constitution in the Cordray controversy, such a new piece of legislation would be well-timed to try to reach a consensus on how to handle disputes in the future. Since any decision is likely to be limited to the specific issues in the case before the Court, such legislation would ideally help avoid future conflicts and reinforce the institutional obligations of both parties.

#### IV. Conclusion

The subject of this hearing is fraught with passions and politics. I do not wish to add to the hyperbolic rhetoric surrounding the current controversies. To be clear, I do not view President Obama as a dictator, but I do view him as a danger in his aggregation of executive power. It is not his motives but his means that I question. It is the danger described by Louis Brandeis in his dissent in *Olmstead v. United States*,<sup>37</sup> where he warned that the “greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding.”

It is my sincere hope that both parties will join in fulfilling their sworn duty to this branch and to the Constitution in putting aside petty or political differences to restore balance to our system. While this may be an exercise of hope over experience of a constitutional scholar, I know from personal experience that there are many constitutionalists on both sides of the aisle. Through the years, I have had many exchanges with Republican and Democratic members who reflected their deep understanding and love for our system. That common article of faith between members once transcended politics and I believe it can do so again. While strong institutional voices like that of Senator Harry Byrd and others are now silent, I am hoping that new voices will be heard in these chambers. What is required is for members to recognize that there is a horizon for this country that extends beyond the term of the current president.

The only thing that joins us is our common faith in a system that has weathered wars, depression, and civil unrest. The current passivity of Congress represents a crisis of faith for members willing to see a president assume legislative powers in exchange for insular policy gains. The short-term, insular victories achieved by this President will come at a prohibitive cost if the current imbalance is not corrected. Constitutional authority is easy to lose in the transient shifts of politics. It is far more difficult to regain. If a passion for the Constitution does not motivate members, perhaps a sense of self-preservation will be enough to unify members. President Obama will not be our last president. However, these acquired powers will be passed to his successors. When that occurs, members may loathe the day that they remained silent as the power of government shifted so radically to the Chief Executive. The powerful personality that engendered this loyalty will be gone, but the powers will remain.

We are now at the constitutional tipping point for our system. If balance is to be reestablished, it must begin before this President leaves office and that will likely require every possible means to reassert legislative authority. No one in our system can “go it alone” – not Congress, not the courts, and not the President. We are stuck with each other in a system of shared powers—for better or worse. We may deadlock or even despise each other. The Framers clearly foresaw such periods. They lived in such a period. Whatever problems we are facing today in politics, they are problems of our own making. They should not be used to take from future generations a system that has safeguarded our freedoms for over 250 years.

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<sup>37</sup> 277 U.S. 438 (1928).

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