DEMOCRATIC MEMORANDUM

From: Judiciary Committee Democratic Staff

Re: Background on Potential Lawsuit Against the President Based on the Take Care Clause

---

In a memorandum to House members dated June 25, 2014, Speaker Boehner indicated his intention to seek House authorization for a lawsuit against President Obama for failing "to faithfully execute the laws of our country – ignoring some statutes completely, selectively enforcing others, and at times, creating laws of his own."[1] Although not identifying in the memorandum any specific executive actions that would form the basis of such a suit, he alleged that the President has "repeatedly run an end-around on the American people and their elected legislators" on "matters ranging from health care and energy to foreign policy and education."[2] He alleged that President Obama violated Article II, Section III of the Constitution, which requires, among other things, that the President "take Care that the Laws be faithfully executed."[3]

On July 10, 2014, the House Rules Committee made public a discussion draft of a resolution to authorize the Speaker, on the House's behalf, to initiate or intervene in "one or more civil actions . . . regarding the failure of the President, the head of any department or agency, or any other officer or employee of the United States" to act in a manner "consistent with that official's duties under the Constitution and laws of the United States with respect to implementation of" the Patient Protection and Affordable Care Act and title I and subtitle B of title III of the Health Care and Education Reconciliation Act of 2010 (ACA). The resolution would authorize the Speaker to seek relief from a federal court pursuant to 28 U.S.C. §§ 2201 (allowing federal courts to grant declaratory relief) and 2202 (allowing federal courts to grant any further necessary and proper relief based on a declaratory judgment or decree), as well as any appropriate injunctive or other ancillary relief.

On July 22, 2014, Rules Committee Chairman Pete Sessions (R-TX) introduced H. Res. 676, which made some changes to the draft resolution, including replacing the references to the two title 28 provisions with a general reference to "any appropriate relief" and expanding the resolution's scope to include any laws "related to" the ACA's implementation.[4]

---

[1] Memorandum of June 25, 2014 from Speaker of the House John Boehner to Members of the U.S. House of Representatives, *available at* http://www.nytimes.com/interactive/2014/06/25/us/25boehner-memo.html.

[2] *Id.*

[3] U.S. Const. art. II, § 3.

[4] H. Res. 676, 113th Cong. (2014).

Based on the testimony and debate during the Judiciary Committee's prior hearings on the Take Care Clause and its consideration of legislation related to enforcement of the Clause as well as the discussion during the Rules Committee hearing on this issue, a lawsuit by one House of Congress against the President for an alleged violation of the Take Care Clause based on his decisions to delay or otherwise exercise discretion in implementing the ACA would fail on both factual and legal bases.

I. A Potential Lawsuit Against the President Would Be Based on the False Premise that He Failed to Faithfully Execute the Law[5]

The potential House lawsuit authorized by the resolution is based on the false premise that the President has failed in his duty to take care that he faithfully execute the laws when the Administration delayed or otherwise exercised discretion in implementing certain provisions of the ACA and related health care reform measures. In each instance, the President was acting pursuant to statutory authority in exercising discretion in the manner in which a highly complex statute would be implemented. The allegation that this exercise of discretion amounted to unconstitutional conduct is patently false.

A. Implementation of the ACA's Employer Mandate

The ACA contains a "shared responsibility" provision that requires large employers either to provide their workers with health insurance that is affordable and provides minimum value or pay a fine if they do not and an employee receives federal financial assistance to obtain insurance through a health marketplace, with the fine helping to offset the cost of the publicly-supported health insurance coverage.[6] Through this provision – also known as the "employer mandate" – Congress wanted to encourage large employers (businesses with 50 or more full-time employees) to offer coverage to their employees. The vast majority (96%) of U.S. businesses employ fewer than 50 employees and are exempt from the large employer mandate.[7] Determining whether an employer is providing insurance, and the need and amount of any fine for an employer who fails to do so, requires the reporting of wage and health insurance

[5] The Republicans have in the past raised other purported examples of the President's failure to faithfully execute the laws, including the Administration's decisions to implement the Deferred Action for Childhood Arrivals program and not to prosecute certain low-level non-violent drug offenses. A more fulsome discussion of these topics is available in the Dissenting Views accompanying H.R. 4138, the "Executive Needs to Faithfully Observe and Respect Congressional Enactments of the Law Act of 2014." *See* H. Rept. 113-337 (March 7, 2014).

[6] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1513, 124 Stat. 119, 253-56, codified at 28 USC § 4980H. This provision applies to businesses with more than 50 full-time employees, with full time defined as an average of 30 hours per week of work. Id.; see also Department of the Treasury, Internal Revenue Service, Patient Protection and Affordable Care Act; Shared Responsibility for Employers Regarding Health Coverage, 26 C.F.R. Parts 1, 54, and 301 (Dec. 28, 2012) (proposed rule).

[7] Kaiser Family Foundation, Employer Health Benefits Survey 2012 Annual Survey (Sept. 11, 2012, kff.org/private-insurance/report/employer-health-benefits-2012-annual-survey/.

information. The ACA requires this reporting.[8] The reporting requirements were set to take effect in January 2014.[9]

In early July 2013, the Obama Administration announced that it would delay for one year the implementation of employer reporting requirements under the ACA as well as assessment of any employer fines.[10] This announcement followed extensive outreach to employers, including two formal requests for information made by the Treasury Department.[11] Throughout this process, Treasury "heard concerns about the complexity of the requirements and the need for more time to implement them effectively."[12] Recognizing that "the vast majority of businesses that will need to do this reporting already provide health insurance to their workers," Treasury explained that its intent is "to make sure it is easy for others to do so."[13] The Department announced that it would soon issue proposed regulations outlining streamlined reporting requirements.

Similarly, on February 10, 2014, the Treasury Department announced new rules stating that employers with 50 to 99 workers will be given until 2016 to comply with the ACA's mandate that they offer health insurance to almost all their full-time workers or risk a federal tax penalty for non-compliance.[14] This represents a two-year delay in meeting the ACA's mandate. Additionally, employers with 100 or more workers will be able to avoid fines by offering

---

[8] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §§ 1502, 1514, 14 Stat. at 250-52 and 256-58, codified at 26 U.S.C. §§ 6055, 6056.

[9] Section 1513(d) of P.L. 111-148, 124 Stat. 119, 256 (March 23, 2010), codified at 26 U.S.C. 4980H note (specifying that provision "shall apply to months beginning after December 31, 2013.").

[10] Internal Revenue Service, Notice 2013-45, Transition Relief for 2014 under §§ 6055 (§ 6055 Information Reporting), 6056 (§ 6056 Information Reporting, and 4980H (Employer Shared Responsibility Provisions) (July 11, 2013), http://www.irs.gov/pub/irs-drop/n-13-45.PDF (explaining that delay in implementation of reporting requirements "make it impractical to determine which employers owe shared responsibility payments . . . Accordingly, no employer shared responsibility payments will be assessed for 2014.")

[11] U.S. Department of the Treasury, Request for Comments on Reporting by Applicable Large Employers on Health Insurance Coverage Under Employer-Sponsored Plans, Notice 2012-33 (Apr. 26, 2012), www.irs.gov/pub/irs-drop/n-12-32.pdf; U.S. Department of the Treasury, Request for Comments on Reporting of Health Insurance Coverage, notice 2012-32 (Apr. 26, 2012), www.irs.gov/pub/irs-drop/n-12-33.pdf.

[12] *Id.*

[13] *Id.*

[14] Shared Responsibility for Employers Regarding Health Coverage, 79 Fed. Reg. 8544 (Feb. 12, 2014) (to be codified at 26 C.F.R. pts. 1, 54, and 301); U.S. Dep't of the Treasury, *Fact Sheet on Final Regulations Implementing Shared Responsibility Under the Affordable care Act*, available at http://www.treasury.gov/press-center/press-releases/Documents/Fact%20Sheet%20021014.pdf; Juliet Eilperin & Amy Goldstein, *White House Delays Health Insurance Mandate for Medium-Sized Employers Until 2016*, Washington Post, Feb. 10, 2014, available at http://www.washingtonpost.com/national/health-science/white-house-delays-health-insurance-mandate-for-medium-sized-employers-until-2016/2014/02/10/ade6b344-9279-11e3-84e1-27626c5ef5fb_story.html.

insurance to 70 percent of their full-time employees, rather than 95 percent as required under the ACA, during 2015, effectively given large employers an additional year to meet the 95 percent coverage requirement.[15] Originally, these mandates were to have gone into effect January 1, 2014.[16]

In announcing the one-year delay for the large employer mandate, the Treasury Department explained that it sought to achieve two goals: (1) "provide additional time for input from employers and other reporting entities in an effort to simplify information reporting consistent with effective implementation of the law;" and (2) "provide employers, insurers, and other providers of minimum essential coverage time to adapt their health coverage and reporting systems."[17] It also explained that this decision would not impact an individual's eligibility for financial assistance through a health marketplace.[18] Individuals who do not receive insurance through employers still may purchase insurance through a marketplace and, if they qualify based on income, obtain tax credits to make this insurance affordable.

In response to questions regarding the Administration's legal authority for delaying implementation, the Treasury Department has explained that this delay "is an exercise of the Treasury Department's longstanding administrative authority to grant transition relief when implementing legislation like the ACA. Administrative authority is granted by section 7805(a) of the Internal Revenue Code."[19] Section 7805(a) provides that "the Secretary [of the Treasury] shall prescribe all needful rules and regulations for the enforcement of this title."[20]

As the Treasury Department further explained, "this authority has been used to postpone the application of new legislation on a number of prior occasions across Administrations."[21] The Department provided several past examples where it had delayed or waived a statutory requirement, including its decision during the George W. Bush Administration to delay implementation of standards that return preparers must follow to avoid penalties under the Small Business Work Opportunity Act of 2007 until 2008 despite the fact that Congress made those

---

[15] *Id.*

[16] Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (2010).

[17] Internal Revenue Service, Notice 2013-45, Transition Relief for 2014 under §§ 6055 (§ 6055 Information Reporting), 6056 (§ 6056 Information Reporting, and 4980H (Employer Shared Responsibility Provisions) (July 11, 2013), http://www.irs.gov/pub/irs-drop/n-13-45.PDF.

[18] *Id.*

[19] Letter from Mark J. Mazur, Assistant Secretary for Tax Policy, U.S. Department of the Treasury to Chairman Fred Upton, et al., at 2 (July 9, 2013), http://democrats.energycommerce.house.gov/sites/default/files/documents/Upton-Treasury-ACA-2013-7-9.pdf) [hereinafter "Mazur Letter"].

[20] 26 U.S.C. § 7805 (2014).

[21] Mazur Letter at 2.

changes effective as of May 25, 2007.[22] The Congressional Research Service (CRS) also has provided recent examples where the Department has delayed implementation beyond a statutorily imposed deadline.[23] Those examples include:

- Despite a congressionally-imposed effective date of December 31, 2011, the IRS postponed the effective date for a requirement that governments withhold 3% of payments to contractors for another year, until December 31, 2012. Similar to the reason for delay here, the Department explained that delay was due to "practical considerations" about the time governments would need to adopt necessary systems and processes;

- The Department postponed for another year the electronic filing mandate under the Worker, Homeownership, and Business Assistance Act of 2009 for preparers filing fewer than 100 returns. The one-year transitional relief period replaced Congress's requirements of electronic filing for returns filed after December 31, 2010 to returns filed after December 31, 2011.

- The Department delayed various deadlines under the Foreign Account Tax Compliance Act (FATCA). Though Congress specified that FATCA was effective and applied to payments made after December 31, 2012, the Department set staggered deadlines for compliance, with the earliest phasing in from January 1, 2014 to January 1, 2015. The Department explained that phased-in implementation was "reasonable" to allow financial institutions to modify their information systems.

- The Department waived payment of taxes imposed on aviation-related purchases until August 8, 2011 despite Congress's decision to make such taxes payable retroactive to July 23, 2011. The Department granted this waiver because imposing the retroactive tax as set by Congress would result in significant administrative burdens.

As these examples make clear, there is nothing unusual about the Administration's decision to provide transitional relief and phase-in the ACA's requirements, particularly where the Department has articulated a reasonable basis for its delay.

Congress often sets statutory deadlines and those deadlines are often missed.[24] Those failures have not been viewed as a violation of a President's constitutional duty to faithfully

[22] *Id.*

[23] Congressional Research Service, Legal Sidebar, Employer Responsibility Requirements Under ACA Postponed – Is There Precedent for Delaying Statutorily Imposed Effective Dates? (July 14, 2013).

[24] *See* Congressional Research Service, Administrative Agencies and Claims of Unreasonable Delay: Analysis of Court Treatment, Report No. R43013 (March 21, 2013).

execute the law. Instead, courts have examined failures to meet statutory deadlines under the Administrative Procedure Act (APA) to determine whether a delay is unreasonable.[25] If so, a court may compel an agency to act.[26] While some courts have been more willing to find unreasonable delay where Congress has set a deadline, courts have not considered the failure to meet a statutory deadline as an automatic indicator of unreasonable delay.[27] None of these courts have treated agency delay as a violation of the Constitution.

Moreover, the House's passage of legislation last year that would have itself delayed implementation of the employer mandate for a year indicates that the delay here was not unreasonable. On July 17, 2013, the House passed H.R. 2667, which would do exactly what the Administration's transitional relief period accomplishes: delay implementation of the employer reporting requirements and related fines for one year. Republicans supporting the bill continued to argue for full repeal of the ACA and paired their delay of the employer mandate with another bill (H.R. 2668) that would delay for a year the individual mandate, which requires individuals to obtain insurance or pay a fine.[28] While agreeing with the one-year delay, they took the position that H.R. 2667 was necessary to provide the President with the "statutory authority that he has already usurped and [to codify] the President's announcement" of delay.[29]

In its Statement of Administration Policy (SAP), the Administration explained that H.R. 2667 (delaying the employer mandate) was unnecessary and H.R. 2668 (delaying the individual mandate) "would raise health insurance premiums and increase the number of uninsured Americans."[30] House Democrats similarly argued that providing transitional relief was within the Treasury's authority and included for the record the CRS report citing prior instances "where the IRS delayed statutory reporting requirements because of the fact that comments from private sector voices around the country wanted that it needed more time to be implemented."[31]

---

[25] *Id.* at 7-10 (reviewing cases involving delays that violate statutory deadlines).

[26] *Id.*

[27] *See, e.g., United Mine Workers of America v. Dep't of Labor*, 554 F.3d 150, 155 (D.C.Cir. 2009) ("We know of no case, however, where a court has taken an agency's failure to meet a statutory deadline (itself not automatically indicative of unreasonable delay) as a springboard for imposing time limits on a remand.") *citing Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984).

[28] 159 Cong. Rec. H4534-57 (daily ed. July 17, 2013).

[29] *Id.* at H4535 (statement of Rep. Burgess).

[30] Office of Management and Budget, Executive Office the President, Statement of Administration Policy on H.R. 2667 & H.R. 2668 (July 16, 2013), http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/113/saphr2667r_20130716.pdf.

[31] 159 Cong. Rec. at H4537-38 (statement of Rep. Courtney).

Allowing flexibility in the implementation of a new program, even where the statute mandates a specific deadline, is neither unusual nor unconstitutional. Such flexibility is integral to the President's duty to "take care" that he "faithfully" execute laws. As Duke University Law School Professor Christopher Schroeder testified before the House Judiciary Committee, "[d]iscretionary choices are unavoidable features in executing almost all laws."[32] He further testified that the "priority setting decisions necessitated by budget constraints necessarily affect *how* the laws are being executed at any point in time, not *whether* they are being executed."[33] He also noted that such discretionary enforcement decisions were routine and were too numerous to count.[34]

The Administration's decisions to phase-in implementation of the employer mandates and other aspects of the ACA were not an attempt to prevent implementation. Indeed, it would defy common sense to suggest that President Obama would act to undermine his signature legislative accomplishment.[35]

B. Renewal and Re-Enrollment in Existing Health Insurance Plans

Last fall, many Americans were notified by their health insurance carriers that their existing policies would be canceled because that existing coverage did not comply with the requirements of the ACA. At the same time, individuals who wanted and needed to purchase insurance were unable to do so on the federal government's health care website due to an array of technical problems.

For many, cancellation of their existing insurance policies was inconsistent with President Obama's earlier statements that individuals who had insurance that they liked would be able to keep it following enactment of the ACA. The Administration responded to the public outcry over policy cancellations by, among other things, adopting a "transitional policy" that would allow health insurers to continue offering coverage that does not meet certain ACA requirements.[36] Individuals can keep their existing coverage for an additional plan year.[37]

---

[32] *Enforcing the President's Constitutional Duty to Faithfully Execute the Laws: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. (2014) (statement of Christopher H. Schroeder, Charles S. Murphy Professor of Law and Professor of Public Policy Studies, Duke University, at 3).

[33] *Id.* at 6 (emphases in original).

[34] *Id.*

[35] As a practical matter, over 90 percent of large employers already offer coverage, so while the delay in the large employer mandate benefits some employers, most are already compliant. The reporting component, however, is a new requirement for all employers and for the government.

[36] Congressional Research Service, Legal Sidebar, Obama Administration's "Fix" for Insurance Cancellations: A Legal Overview, November 18, 2013.

As discussed above, the Administration's authority for providing this type of transitional relief is based on its discretion to decide when, whether, and against whom to bring civil enforcement actions. The Supreme Court consistently has affirmed broad agency enforcement discretion and has yet to find decisions regarding implementation of a statute to be a violation of the Take Care Clause.

C. Subsidies for Purchase of Insurance on the Federal Exchanges

In addition to requiring that individuals purchase health insurance coverage (the "individual mandate"), the ACA also provides that states will create health insurance exchanges for invididuals to obtain coverage and establishes tax subsidies so that income-eligible individuals can afford insurance offered on these exchanges.[38] Where a state does not set up an exchange, the ACA requires the federal government to do so.[39]

Opponents of the ACA have argued that, if a state refuses to set up an exchange and the federal government sets one up in its place, income-eligible individuals who purchase insurance on the federal exchange are not entitled to receive a tax subsidy for that purchase. Some ACA opponents claim that the ACA limits subsidies for purchases on "exchanges established by the State,"[40] thereby foreclosing any such subsidies for purchases in federal exchanges. According to these critics, Congress's express reference to state exchanges – and its failure to expressly mention federal exchanges – in the ACA tax-credit provisions limits tax relief to individuals who are able to buy their insurance through a state exchange.[41]

Many legal scholars disagree with this argument. They note that Section 1321 of the ACA states that for any state that fails to establish an exchange, the federal government "shall (directly or through agreement with a not-for-profit entity) establish and operate such Exchange within the State."[42] In their view, the statutory reference to "*such* exchange" indicates that the federally-operate exchange "will stand in the shoes of a state-operated exchange created by Section 1311 [of the ACA]," and therefore "there is no basis for denying participants in

---

[37] Gary Cohen, Director, Center for Consumer Information and Oversight, Dept. of Health and Human Services, Letter to State Insurance Commissioners, Nov. 14, 2013, http://www.cms.gov/CCIIO/Resources/Letters/Downloads/commissioner-letter-11-14-2013.PDF.

[38] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1311, 14 Stat. at {XX}, codified at 42 U.S.C. § 18031.

[39] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1321, 14 Stat. at {XX}, codified at 42 U.S.C. § 18041.

[40] See, e.g., 26 U.S.C. § 36B(2)(A), (c)(2)(A)(i).

[41] Alec Mac Gillis, Obamacare's Single Most Relentless Antagonist, New Republic, Nov. 12, 2013, http://www.newrepublic.com/article/115576/obamacares-web-site-exchange-woes-trace-catos-michael-cannon.

[42] 42 U.S.C. § 1804(c)(1) (2014).

federally-operated exchanges the same tax credits obtained by participation in state-operated exchanges."[43]

The IRS has agreed, rejecting the argument that tax relief is limited to state exchanges. In its final regulations, issued May 23, 2013, the IRS explained that, for purposes of subsidizing purchases in health care exchanges, "the term Exchange has the same meaning as in 45 CFR 155.20, which provides that the term Exchange refers to a State Exchange, regional Exchange, subsidiary Exchange, and Federally-facilitated Exchange."[44]

In so ruling, the IRS noted that some commentators had argued that the ACA statutory language limits the availability of the premium tax credit only to taxpayers who enroll in qualified health plans on state exchanges. The IRS nonetheless concluded that the text and legislative history of the ACA supported the conclusion that tax credits would be available to income-eligible individuals regardless of where they purchased their insurance. As the IRS explained:

> The statutory language of section 36B and other provisions of the Affordable Care Act support the interpretation that credits are available to taxpayers who obtain coverage through a State Exchange, regional Exchange, subsidiary Exchange, and the Federally-facilitated Exchange. Moreover, the relevant legislative history does not demonstrate that Congress intended to limit the premium tax credit to State Exchanges. Accordingly, the final regulations maintain the rule in the proposed regulations because it is consistent with the language, purpose, and structure of section 36B and the Affordable Care Act as a whole.[45]

This interpretation fulfills Congress's intent of providing an equivalent federal option in states that decide against establishing their own exchanges. To hold otherwise, and deprive individuals of tax credits in states without exchanges, would mean that federally-operated exchanges would not substitute fully for exchanges in states that elect not to create them and that individuals who need the credit to afford coverage (something required of them by the "individual mandate") will not be able to get it in those states. This, in turn and as intended by opponents, would undermine and potentially bring an effective end to the ACA as the law depends on the individual and employer mandates, the exchanges, and the tax subsidies all

---

[43] Sam Bagenstos, The Legally Flawed Rearguard Challenge to Obamacare, Nov. 27, 2013, http://balkin.blogspot.com/2012/11/the-legally-flawed-rearguard-challenge.html.

[44] Dept. of the Treasury, IRS, Health Insurance Premium Tax Credit, 77 FR 30377, 30378, 2012 WL 1853896 (May 23, 2012).

[45] *Id.*

working together to create a sustainable system. In any event, and regardless whether the courts ultimately agree with the IRS regarding tax subsidies in federally-operated exchanges, that interpretation appears to be a permissible and reasonable reading by the IRS of the ACA's text and history and a far cry from a failure to "take care" that the law be executed faithfully.

II. The House Would Lack Constitutionally-Required Standing to Pursue a Suit Based on the Take Care Clause and Such a Suit Would Be Inconsistent with the Political Question Doctrine

A. The House Likely Would Lack Article III Standing

1. Background

A court would likely find that the House of Representatives lacks standing to pursue a lawsuit based on the President's alleged violation of the Take Care Clause. In order to participate as party litigants in any suit, congressional plaintiffs – whether they are individual Members, committees, or Houses of Congress – must demonstrate that they meet the requirement established by Article III of the Constitution that "cases" or "controversies" exist.[46] Included in this requirement is the requirement of standing. The failure to establish standing is fatal to the litigation and will result in its dismissal without the court addressing the merits of the presented claims.

Generally, the doctrine of standing is a threshold question that does not turn on the merits of a plaintiff's complaint, but, rather, on whether the particular plaintiff has a legal right to a judicial determination on the issues before the court.[47] There are both constitutional requirements and prudential considerations concerning standing.[48] Accordingly, the courts have "consistently declined to exercise any powers other than those which are strictly judicial in their nature."[49] Thus, it has been said that "'the law of Art. III standing is built on a single basic idea—the idea of separation of powers.'"[50]

To satisfy the constitutional standing requirements in Article III, the Supreme Court imposes three requirements. First, the plaintiff must allege a personal injury-in-fact, which is actual or imminent, concrete, and particularized. Second, the injury must be "'fairly traceable to

[46] U.S. Const. art. III, § 2.

[47] *Flast v. Cohen*, 392 U.S. 83, 99 (1968).

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

[49] *Raines v. Byrd*, 521 U.S. 811, 819 (1997) (quoting Muskrat v. U.S., 219 U.S. 346, 356 (1911)).

[50] *Id.* at 820 (quoting Allen v. Wright, 468 U.S. 737, 752 (1984)).

the defendant's allegedly unlawful conduct.'"[51] Third, the injury must be "likely to be redressed by the requested relief."[52] Where separation of powers is implicated by the dispute, the standing inquiry is "especially rigorous," and a plaintiff must demonstrate that "the dispute is 'traditionally thought to be capable of resolution through the judicial process.'"[53]

Raines v. Byrd is the Supreme Court case that established the current standard for evaluating whether individual Members of Congress have standing to sue the Executive Branch.[54] In *Raines*, the Supreme Court dismissed a suit by Members of Congress challenging the constitutionality of the Line Item Veto Act, holding that their complaint did not establish that they had suffered a personal, particularized, and concrete injury.[55] The plaintiffs had alleged that the Line Item Veto Act unconstitutionally expanded the President's power and violated the Constitution's Bicameralism and Presentment Clauses by giving the President the authority to unilaterally repeal provisions of federal law.[56]

While concluding that the individual-Member plaintiffs lacked standing to pursue a constitutional challenge to the Line Item Veto Act, the Court suggested that a congressional plaintiff may have standing in a suit against the Executive Branch if he or she alleges either: (1) a personal injury (e.g., loss of a Member's seat), or (2) an institutional injury that is not "abstract and widely dispersed" and amounts to vote nullification.[57] In *Raines*, the Court concluded that although the plaintiffs asserted an institutional injury, their votes were not nullified because of the continued existence of other legislative remedies. These legislative remedies included the

[51] *Dep't of Commerce*, 525 U.S. at 329 (quoting Allen, 468 U.S. at 751).

[52] *Id.* In addition to the constitutional questions posed by the doctrine of standing, federal courts also follow a well-developed set of prudential principles that are relevant to a standing inquiry. Unlike their constitutional counterparts, prudential standing requirements are judicially created and "can be modified or abrogated by Congress." Bennett v. Spear, 520 U.S. 154, 162 (1997). These prudential principles require that: (1) the plaintiff assert his own legal rights and interests, rather than those of a third party; (2) the plaintiff's complaint fall within the "zone of interests" protected or regulated by the statute or constitutional guarantee in question; and (3) the plaintiff not assert "'abstract questions of wide public significance' which amount to 'generalized grievances' pervasively shared and most appropriately addressed in the representative branches." Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, 454 U.S. 464, 475 (1982) **(**quoting Warth v. Seldin, 422 U.S. 490, 499-500 (1957)).

[53] *Raines*, 521 U.S. at 819 (quoting *Flast*, 392 U.S. at 97).

[54] 521 U.S. 811 (1997).

[55] *Id.* at 818-820.

[56] *Id.* at 816.

[57] *Id.* at 829.

ability of "a majority of Senators and Congressman [to] vote to repeal the Act, or to exempt a given appropriations bill (or a given provision in an appropriations bill) from the Act . . . ."[58]

Thus far, the only instances where federal courts have found that a House of Congress had *institutional* standing have been in subpoena enforcement cases and in one instance when Congress intervened to defend the constitutionality of the one-House legislative veto. In all of these instances, it appears that an institutional plaintiff has only been successful in establishing standing when it has been authorized to seek judicial recourse on behalf of a House of Congress. In the past, a one-House resolution that specifically authorizes judicial recourse has satisfied this authorization requirement, although authorization alone is not sufficient to grant standing.[59] Moreover, where one House of Congress has in the past successfully established standing, it was in the context of defending a fundamental power or prerogative of the chamber to be able to carry out its constitutionally mandated duties, like the enforcement of subpoenas or a one-House legislative veto.[60]

The *Raines* vote nullification requirement would likely not be satisfied in cases where an institutional plaintiff files suit to challenge an executive action because, unlike in the subpoena enforcement context, legislative actions that remedy the institutional plaintiff's injury do exist. If the *Raines* vote nullification standard were applied to institutional plaintiffs, the existence of legislative remedies may prevent an institutional plaintiff, like a House of Congress, from establishing standing. The following actions could serve as potential remedies to executive actions: the repeal or disapproval of executive branch regulations or guidance documents establishing the challenged policies; employing the power of the purse to restrict the use of funds to administer objectionable programs or other executive actions; legislation eliminating, limiting, or clarifying the scope of agency discretion with regard to the implementation of existing laws; and oversight activity. Finally, where Congress concludes that the President has exceeded his constitutional authority, it could choose to impeach him.[61] Because the Constitution requires parties to meet Article III standing requirements, Congress cannot simply overcome those requirements by claiming to grant itself standing to sue.

---

[58] *Id.* at 824.

[59] *See Comm. on the Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 71 (D.D.C. 2008) (finding that House Judiciary Committee had standing to sue to enforce a congressional subpoena in part because it "ha[d] been expressly authorized . . . by the House of Representatives as an institution" to bring the suit by House resolution).

[60] *See id.*; *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983).

[61] U.S. Const. art. I, § 2. cl. 5.

2. Rebuttal of Rivkin/Foley Theory

Attorney David Rivkin and law professor Elizabeth Price Foley claim that one House of Congress may be able to establish standing to sue the President for an alleged violation of the Take Care Clause.[62] They argue that *Raines* established only a presumption against congressional standing that can be refuted under the right circumstances and that those circumstances are present in the case of President Obama's allegedly unconstitutional executive actions.[63] Specifically, they contend that the standing requirement might be met because: (1) the President's failure to execute the laws amounts to complete nullification of Congress's votes; (2) where separation of powers is at issue and there is no other plaintiff to pursue a lawsuit to enforce that principle, Congress should have standing to sue; and (3) *U.S. v. Windsor* suggests that if there is House authorization for a suit, the case for standing is strengthened.[64]

a. Vote Nullification

Rivkin and Foley argue that any lawsuit by one House of Congress alleging that the President has failed to faithfully execute a law would allege an injury sufficiently concrete to support Article III standing. By completely suspending his enforcement of certain laws, they contend, the President has effectively nullified Congress's power, leaving no way to check the President's power other than through impeachment. [65]

To establish that Congress's legislative power was nullified by executive action, however, Congress would have to demonstrate to a court that the executive action at issue deprived Members' votes of *all* validity and that the executive action will continue to nullify votes in the future, leaving no mechanism to respond legislatively to the executive action.[66] Congress, however, remains free to limit funding for any executive actions that it finds

---

[62] *H. Res.__ - Providing for authority to initiate litigation for actions by the President inconsistent with his duties under the Constitution of the United States: Hearing Before the H. Comm. on Rules*, 113th Cong. (2014) [hereinafter "Rules Hearing"] (statement of Elizabeth Price Foley, Professor of Law, Florida International University College of Law); *Enforcing the President's Constitutional Duty to Faithfully Execute the Laws: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. (2014) (statement of Elizabeth Price Foley, Professor of Law, Florida International University College of Law) [hereinafter "Foley Statement"]; David Rivkin & Elizabeth Price Foley, *Can Obama's Legal End-Run Around Congress Be Stopped?*, Politico Magazine, Jan. 15, 2014, *available at* http://www.politico.com/magazine/story/2014/01/barack-obama-constitution-legal-end-run-around-congress-102231_Page2.html#.U76vs_ldV8E [hereinafter "Politico Article"].

[63] *Id.*

[64] *Id.*

[65] Foley Statement at 6-19; 25-32; Politico Article. The fact that impeachment may, as a practical or political matter, be a difficult process is of no relevance to the Constitutional inquiry as to whether Congress has suffered a concrete and particularized injury sufficient to meet Article III's standing requirements.

[66] Raines, 521 U.S. at 823-24.

objectionable, to conduct oversight activity to apply political pressure on the President, and, as Rivkin and Foley note, to impeach the President should it conclude that he has violated the Constitution. The effectiveness of a congressional vote and of Congress's legislative power would not be completely undermined. In other words, Congress retains legislative remedies in response to any offending executive action, meaning that its legislative power has not been nullified such that it has suffered the kind of concrete and particularized injury required by Article III. Like the allegations made by the plaintiffs in *Raines*, the alleged injury that the President violated the Take Care Clause would be akin to claiming that he diluted Congress's institutional legislative power, which would not be sufficient to establish Article III standing.

Rivkin and Foley claim that a Take Care Clause lawsuit against the President would be akin to the situation in *Coleman v. Miller*, a 1939 Supreme Court decision in which the Court held that a group of Kansas state legislators had standing to pursue a writ of mandamus.[67] In *Coleman*, 20 of 40 Kansas state senators voted against ratifying a child labor amendment to the U.S. Constitution.[68] With a 20 to 20 vote, the amendment would not have been ratified.[69] The Lieutenant Governor, however, as the state senate's presiding officer, cast a deciding vote in favor of ratification. [70] The state senators filed an action in the Kansas Supreme Court seeking a writ of mandamus to compel state officials to recognize that the legislature had not ratified the amendment.[71] In finding, on appeal, that the state senators had standing to pursue the action, the U.S. Supreme Court concluded that if the legislators were correct on the merits of their case, their votes not to ratify the amendment would be deprived of all validity.[72] In *Raines*, the Court, explaining *Coleman*, stated that "our holding in *Coleman* stands (at most . . .) for the proposition 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."[73]

The President's purported failure to faithfully execute the law would be distinguishable from the injury alleged in *Coleman*. The legislators in *Coleman* had standing because there was no other way for those legislators to "not ratify" a constitutional amendment once the Lieutenant Governor (allegedly improperly) cast his deciding vote in favor of ratification. Where, as would

[67] 307 U.S. 433 (1939).

[68] *Id.* at 436.

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.* at 438.

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

be the case in a Take Care Clause lawsuit, there are other means available to effectuate a legislature's power, there would be no such complete nullification. Indeed, in *Raines*, the Court rejected the Member plaintiffs' attempt to give *Coleman* the broad reading that action that simply changes the meaning and effectiveness or otherwise dilutes the power of their legislative votes was sufficient to establish Article III standing. The Court in *Raines* concluded that 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."[74] Likewise, a Take Care Clause lawsuit, alleging, in broad terms, that the President is unconstitutionally aggrandizing power at the expense of Congress in the way he has chosen to exercise his enforcement discretion, is really an allegation about the "abstract dilution of institutional legislative power" that the Court has found insufficient to establish Article III standing.

Finally, to the extent that Rivkin and Foley may look to the *Miers* case and other congressional subpoena enforcement actions, those cases do not support the establishment of standing in a Take Care Clause action. As noted earlier, the only cases where a House of Congress has established institutional standing is when it sought to defend a fundamental power like a subpoena or a legislative veto against complete nullification of that power. Where, as in *Raines*, the complaint is that Congress's legislative power has been diminished by an executive action, such an argument, absent more, cannot constitute a sufficiently concrete injury for standing purposes.

During the Rules Committee hearing, Walter Dellinger, the former Acting Solicitor General of the United States who successfully argued *Raines* for the government, testified that "the House of Representatives lacks authority to bring such a suit. Because neither the Speaker nor even the House of Representatives has a legal *concrete, particular and personal stake* in the outcome of the proposed lawsuits, federal courts would have no authority to entertain such actions."[75]

In addition to citing Justice Scalia's dissent in *Windsor* (discussed more fully *infra.*), Dellinger cited additional conservative legal scholars who had expressed doubt over congressional standing to sue over Executive Branch enforcement decisions. For instance, he noted Chief Justice William Rehnquist's opinion in *Raines,* in which the Court held that "[a] plaintiff must allege *personal injury* fairly traceable to the defendant's allegedly unlawful conduct."[76] Thus, Dellinger argued, "because the House only asserts a generalized interest in the proper administration of the ACA and fails to assert a personal stake in the litigation, it will fail

[74] *Id.* at 826.

[75] Rules Hearing (statement of Walter Dellinger, Partner of O'Melveny & Meyers LLP).

[76] *Id.* at 3 (citing *Raines*, 521 U.S. at 818-19).

to establish Article III standing."[77] Dellinger added that Chief Justice Roberts echoed this sentiment in *Hollingsworth v. Perry*, in which the Court held that "To have standing, a litigant must seek relief for an injury that affects him in a personal and individual way . . . . This is an essential limit on our power: It ensures that we act as judges, and do not engage in policymaking properly left to elected representatives."[78] Dellinger also noted that the head of the Office of Legal Counsel at the Justice Department during the George W. Bush Administration, Jack Goldsmith, had also expressed strong skepticism about Congressional standing.

b. No Other Plaintiff Available

Rivkin and Foley further argue that there should be no standing problem for one House of Congress to file suit when the separation of powers principle is at stake because no other plaintiffs are able to enforce that principle.[79] They claim that other potential plaintiffs would not challenge President Obama's actions because those actions were "benevolent" suspensions of the law by which the president exempted certain classes of people from the operation of the law. [80] They cite as an example the DREAMers who benefitted from the DACA program as examples of people who were not sufficiently harmed to create standing to sue.[81]

Rivkin and Foley cite *no* authority for the proposition that the lack of availability of other plaintiffs to file a lawsuit would somehow do away with Article III's requirement that the House or any other plaintiff have an actual, concrete, and particularlized injury in order to have standing to sue. The Supreme Court has made clear that injury "amounting only to the alleged violation of a right to have the Government act in accordance with law was not judicially cognizable" for Article III standing purposes.[82] To allow standing based on an "undifferentiated public interest in executive officers' compliance with the law . . . is to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take care that the Laws be faithfully executed.'"[83] The fact that there may be no private plaintiff to assert a Take Care Clause violation does not thereby confer standing on one House of Congress to pursue such litigation.

---

[77] *Id.*

[78] *Id.* at 2 (citing *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659-62 (2013)).

[79] Foley Statement at 21-25; Politico Article.

[80] Foley Statement at 24; Politico Article.

[81] *Id.*

[82] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 575-576 (1992).

[83] *Id.* at 577.

c. House Authorization and Effect of *Windsor*

In addition to the lack of other plaintiffs, Rivkin and Foley argue that the case for standing could be bolstered when one House of Congress authorizes suit, making it less of a political dispute and more of a broad-based institutional suit to vindicate the rights of the legislative branch.[84] They claim that the Supreme Court's decision in *U.S. v. Windsor*, which held section 3 of DOMA to be unconstitutional, suggests that suits by the House as an institution are of a different character than suits by individual Members.[85] In *Windsor*, the Department of Justice (DOJ) decided not to defend the constitutionality of the Defense of Marriage Act (DOMA) once the case reached the appellate level.[86] In response, the House's Bipartisan Legal Advisory Group (BLAG) voted to intervene to defend DOMA.[87] Rivkin and Foley maintain that the Court found that BLAG had standing to participate in the suit.[88] They claim that "without judicial review of the president's suspension [of the law], there is literally no other way – short of impeachment – to defend separation of powers."[89]

While the Court in *Raines* did place "some importance" on the fact that the plaintiffs in that case did not have authorization to represent their respective Houses of Congress in litigation, the existence of authorization is not dispositive on the question of standing.[90] Moreover, Congress cannot simply give itself Article III standing where it does not exist by passing authorizing legislation. Article III's standing requirements enforce the Constitution's separation-of-powers principles as between the courts, on the one hand, and the political branches, on the other. Also, to the extent that Article III requires a particularized injury, the asserted injury here (i.e., the dilution of Congress's legislative authority) is to the whole Congress, and not simply to one House. Therefore, Article III would likely require that any lawsuit be authorized by both Houses of Congress in order for there to be an institutional injury sufficient to confer Article III standing.

Additionally, Rivkin and Foley's contention mischaracterizes the holding in *Windsor* regarding standing. In *Windsor*, the plaintiff, the surviving member of a same-sex couple, sought a refund for a federal estate tax payment that she was required to pay because she was not

---

[84] Foley Statement at 19-21; Politico Article.

[85] *U.S. v. Windsor*, 133 S. Ct. 2675 (2013).

[86] *Id.* at 2683.

[87] *Id.* at 2684.

[88] Politico Article.

[89] *Id.*

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

entitled to a marriage exemption in light of DOMA.[91] In discussing Article III standing, the Court concluded that there was a sufficient adversarial posture between *the United States* and the plaintiff in that case notwithstanding the fact that the DOJ chose to no longer defend DOMA's constitutionality because the plaintiff was still seeking her refund and the United States Treasury would not pay her the refund absent a court order.[92] The majority opinion contained no discussion of BLAG's Article III standing and made only passing reference to BLAG in its discussion of *prudential* standing.[93] Indeed, the majority made it clear that it "need not decide whether BLAG would have standing to challenge" the lower court decisions and simply avoided addressing the question of BLAG's standing.[94]

Writing for himself in dissent in *Windsor*, Justice Samuel Alito opined that BLAG had standing to pursue the *Windsor* case because the injury alleged – i.e., the lower court holding had effectively nullified an Act of Congress -- was sufficiently concrete and particularlized to Congress and because the Executive Branch refused to defend the law.[95] In his separate dissent in *Windsor*, no less a conservative than Justice Antonin Scalia, joined by Chief Justice John Roberts and Justice Clarence Thomas, criticized the Alito dissent on this point, stating:

> Heretofore in our national history, the President's failure to "take Care that the Laws be faithfully executed," could only be brought before a judicial tribunal by someone whose concrete interests were harmed by that alleged failure. Justice Alito would create a system in which Congress can hale the Executive before the courts not only to vindicate its own institutional powers to act, but to correct a perceived inadequacy in the execution of its laws. This system would lay to rest Tocqueville's praise of our judicial system as one which "intimately binds the case made for the law with the case made for one man," one in which legislation is "no longer exposed to the daily aggression of the parties," and in which "the political question that the judge must resolve is linked to the interest of private litigants."
>
> That would be replaced by a system in which Congress and the Executive can pop immediately into court, in their institutional capacity, whenever the President refuses to implement a statute he believes to be unconstitutional, and whenever he implements a law in a manner that is not to Congress's liking.

---

[91] *Windsor*, 133 S. Ct. at 2682.

[92] *Id.* at 2686.

[93] *Id.* at 2688.

[94] *Id.*

[95] *Id.* at 2711-14 (Alito, J., dissenting).

. . .

> If majorities in both Houses of Congress care enough about the matter, they have available innumerable ways to compel executive action without a lawsuit - from refusing to confirm Presidential appointees to the elimination of funding.[96]

For these reasons, among others, Justice Scalia concluded that the Court had no power to decide the suit.[97]

B. A House Lawsuit Based on the Take Care Clause Raises Non-Justiciable Political Questions

Any House lawsuit to enforce the Take Care Clause against the President will likely raise a political question problem, making it likely that a federal court would decline to hear the case. Federal courts will not hear a case if they find that it presents a political question. The Supreme Court has held that federal courts should not hear cases that deal directly with issues for which the Constitution has directly given responsibility to the other branches of government or for which a judicial forum is otherwise inappropriate. In the leading decision, *Baker v. Carr*, the Court enumerated the various factors that would make a question political:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[98]

Professor Laurence Tribe of Harvard Law School, in a memorandum to House Judiciary Committee Democratic staff analyzing legislation that would have set up a process allowing one House of Congress to authorize a Take Care Clause lawsuit against the President, noted that the

---

[96] *Id.* at 2703-05 (Scalia, J., dissenting) (internal citations and marks omitted).

[97] *See also* Dana Milbank, *A Lawsuit with Little Merit*, Wash. Post, Jul. 17, 2014, *available at* http://www.washingtonpost.com/opinions/dana-milbank-a-lawsuit-with-little-merit/2014/07/16/73dd7d2e-0d38-11e4-8341-b8072b1e7348_story.html?hpid=z2 (noting Republican hypocrisy in pursuing a lawsuit against the President while decrying "judicial activism" and further noting that Professor Foley had earlier taken the position that Congress likely would not have standing and that Professor Turley was skeptical about standing).

[98] 369 U.S. 186, 217 (1962).

Supreme Court's jurisprudence regarding section 701(a)(2) of the Administrative Procedure Act (APA)[99] indicates how unwilling courts are to become involved with telling an executive branch agency how to exercise its discretion.[100] He noted Justice Scalia's opinion in *Norton v. South Utah Wilderness Alliance*, where Scalia said:

> If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved-which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management.[101]

Professor Tribe noted that although Justice Scalia was interpreting the APA, there was nothing about his analysis that would not fall under the Court's political question jurisprudence as well.[102] Virtually all of the factors enumerated in *Baker v. Carr* would be implicated by allowing Congress to sue the President over enforcement of the Take Care Clause. Professor Tribe concluded that in such a civil action, a judge would be put in the position of directing a federal officer how to exercise his or her discretion in enforcing a law, and doing so would cut at the heart of separation of powers and, for that reason, would likely lead to a case being dismissed.

III. Speaker Boehner's Hypocrisy in Previous Support for Use of Executive Orders

Notwithstanding Speaker Boehner's concerns about the use of executive action, he strongly supported the use of executive orders during the George W. Bush administration. For example, in 2001 and 2007, Speaker Boehner supported President Bush's use of executive orders

[99] 5 U.S.C. §§ 551-59, 701-06, 1305, 3105, 3344, 5372, 7521 (2014).

[100] Memorandum from Laurence H. Tribe to Democratic Staff of the House Judiciary Committee 5 (Mar. 3, 2014) (on file with H. Committee on the Judiciary, Democratic Staff) [hereinafter "Tribe memo"].

[101] 542 U.S. 55, 66-67 (2004).

[102] Tribe memo at 5.

to prevent embryonic stem-cell research involving new embryos.[103] Speaker Boehner further applauded President Bush's 2008 executive order reducing the scope and number of earmarks.[104]

Speaker Boehner specifically requested President Bush to use an executive order to protect a historic steamboat. In a 2008 letter to President Bush, Speaker Boehner requested that the President issue an executive order to extend the exemption to the Delta Queen from certain vessel laws included in the 1966 Safety at Sea Act.[105]

IV. Chairman Goodlatte Falsely Contends That the Supreme Court Has Found that President Obama Exceeded his Constitutional Authority 13 Times

On "Fox News Sunday" on June 29, 2014, House Judiciary Committee Chairman Bob Goodlatte stated that the "9-0 decision last week [in *National Labor Relations Board v. Noel Canning*] was the 13th time the Supreme Court voted 9-0 that the president had exceeded his constitutional authority."[106] A review of the 13 cases cited does not support this statement.[107] For

---

[103] *See* Derrick DePledge, *Chabot: Stem-Cell Plan Rides Slippery Slope*, ENQUIRER (Aug. 11, 2001), http://enquirer.com/editions/2001/08/11/loc_achabot_stem-cell.html (discussing the support of the 2001 executive order on stem cells); *An Ethical Approach to Stem Cell Research, available at* https://web.archive.org/web/20081216235535/http:/johnboehner.house.gov/News/DocumentSingle.aspx?DocumentID=72164 (discussing the support of the 2007 executive order).

[104] Speaker Boehner's Press Office, *Boehner: If Democratic Leaders Want to Protect a Broken Earmark System, They Should Say So. If They Want to Fix It, We Stand Ready to Work with Them* (Jan. 28, 2008) (supporting President Bush's executive order on earmarks).

[105] Letter from John Boehner, Speaker of the U.S. House of Representatives, to George W. Bush, U.S. President (Dec. 3, 2008) *available at* https://web.archive.org/web/20090325122340/http:/www.johnboehner.house.gov/UploadedFiles/120308DeltaQueenLetter.pdf.

[106] Steve Contorno, *GOP Leader: Supreme Court Has Ruled 13 Times that Obama Exceeded His Constitutional Authority*, POLITIFACT (June 29, 2014), http://www.politifact.com/truth-o-meter/statements/2014/jun/29/bob-goodlatte/gop-leader-supreme-court-has-ruled-13-times-obama-/.

[107] *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S.Ct. 694 (2012) (holding that a federal discrimination law did not apply to a church's selection of religious leaders); *Arizona v. US*, 132 S. Ct. 2492 (2012) (holding that three provisions of an Arizona law regarding immigrants were invalid because they interfered with federal policy, but left intact a fourth provision requiring arrest and detention of anyone believed to be in the country illegally and have committed a crime); *PPL Corp. v. Comm'r of Internal Revenue*, 133 S. Ct. 13897 (2013) (holding that a foreign "Windfall Tax" on a recently privatized company could be credited against the taxpayer's U.S. income tax); *Gabelli v. SEC*, 133 S. Ct. 1216 (2013) (holding that the statute of limitations for the SEC to bring a civil suit against investment advisers for securities frauds begins when the fraud occurs and not when it is discovered as the SEC had argued); *Ark. Game & Fish Comm'n v. US*, 133 S. Ct. 511 (2012) (holding that government-induced flooding, though temporary in duration, was not automatically exempt from the Takings Clause); *Horne v. USDA*, 133 S. Ct. 2053 (2013) (holding that a farmer who as violated an agricultural marketing order and fined, but argues that the fine is an unconstitutional "taking" can bring his claim in a federal district court without first paying the fine); *US v. Jones*, 132 S. Ct. 945 (2012) (holding that the FBI's attachment of GPS tracking devices and use of the GPS to track movement constituted a "search" under the Fourth Amendment); *Riley v. California*, 2014 WL 2864483 (2014) (holding that the interest in protecting police officers' safety and the prevention of the destruction of evidence did not justify search cell phone data without warrants); *Sackett v. EPA*, 132 S. Ct. 1367 (2012) (holding

instance, in *United States v. Jones*, the Court held that the FBI conducted "searches" under the language of the Fourth Amendment when it placed GPS tracking devices on cars.[108] While the FBI is under the jurisdiction of the Department of Justice, which is part of the executive branch, the decision was based on the Fourth Amendment, not on a claim that President Obama exceeded his authority.[109]

In another case on Goodlatte's list, *McCullen v. Coakley*, the Court determined the constitutionality of a Massachusetts law that created "no-protest zones" around abortion clinics.[110] The Obama Administration filed a brief supporting the law, but the Court's decision did not concern the President's executive authority.[111]

Finally, in eight cases, the alleged executive overreach occurred under President George W. Bush and President Bush's Justice Department handled the initial court proceedings.[112]

V. A Lawsuit Could Potentially Cost Millions in Taxpayer Money

Pursuing a House lawsuit against the President based on the Take Care Clause potentially could open the floodgates to possibly endless litigation over any number of the President's decisions. Such litigation would be time-consuming, complex, and expensive, particularly when outside counsel is retained. For instance, a law firm hired to represent the House in its defense of DOMA charged $520 an hour for its services and received an initial $500,000 fee.[113] The

---

that petitioners could bring a civil action under the Administrative Procedure Act to challenge an EPA compliance order issued under the Clean Water Act); *Sekhar v. US*, 133 S. Ct. 2720 (2013) (holding that legal advice was not "transferrable property" and therefore not applicable under the Hobbs Act); *Bond v. US*, 131 S. Ct. 2355 (2011) (holding that the defendant may have standing to raise 10th Amendment challenges to federal law and that the Chemical Weapons Convention Implementation Act does not govern local matters); *McCullen v. Coakley*, The Oyez Project at IIT Chicago-Kent College of Law, http://www.oyez.org/cases/2010-2019/2013/2013_12_1168 (last visited July 6, 2014) (holding that a Massachusetts law creating a buffer zone around abortion clinics violated the first amendment). *But see NLRB v. Noel Canning*, 2014 WL 2882090 (2014) (holding that President Obama's appointments to the NLRB were invalid because Congress was not in "recess").

[108] *U.S. v. Jones*, 132 S. Ct. 945, 949 (2012).

[109] *Id.*

[110] *McCullen v. Coakley*, The Oyez Project at IIT Chicago-Kent College of Law, http://www.oyez.org/cases/2010-2019/2013/2013_12_1168 (last visited July 6, 2014) (holding that a Massachusetts law creating a buffer zone around abortion clinics violated the first amendment).. *But see NLRB v. Noel Canning*, 2014 WL 2882090 (2014).

[111] *Id.*

[112] *US v. Jones*, 132 S. Ct. 945 (2012); *Sackett vs. EPA*, 132 S. Ct. 1367 (2012); *Hosanna-Tabor Evangelical Lutheran Church & School vs. EEOC*, 132 S.Ct. 694 (2012); *Gabelli vs. SEC*, 133 S. Ct. 1216 (2013); *Ark. Fish & Game Comm'n v. US*, 133 S. Ct. 511 (2012); *PPL Corp. vs. Comm'r of Internal Revenue*, 133 S. Ct. 13897 (2013); *Horne vs. USDA*, 133 S. Ct. 2053 (2013); *Bond vs. United States*, 131 S. Ct. 2355 (2011).

[113] Letter from Representative Nancy Pelosi, Democratic Leader, to Representative John Boehner, Speaker of the House, Concerning Litigation on the Defense of Marriage Act, April 20, 2011, *available at* http://www.democraticleader.gov/news/press/pelosi-questions-boehner-house-contract-outside-doma-counsel.

House ultimately spent $2.3 million on that litigation.[114] The cost of what would likely be frivolous litigation would have to be borne by American taxpayers.

[114] Ian Millhiser, House Republicans Charged the American Taxpayer $2.3 million to Lose DOMA Case, Jun. 26, 2013, *available at* http://thinkprogress.org/justice/2013/06/26/2219971/house-republicans-charged-the-american-taxpayer-23-million-to-lose-doma-case/.