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# Executive Action and Nonaction

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## EXECUTIVE ACTION AND NONACTION\*

TOM CAMPBELL\*\*

*Executive action and nonaction should be amenable to judgment by federal courts, distinguishing unlawful from permissible discretion. Previous commentators have been largely skeptical of standing for Congress to challenge executive action and nonaction, but most of that commentary preceded the Supreme Court's revival of legislator standing last term in Arizona State Legislature v. Arizona Independent Redistricting Commission, and the Court's recent invitation in the order granting certiorari in United States v. Texas (affirmed by an equally divided court) to consider the meaning of the President's obligation to take care that the laws be faithfully executed. Problems a court might encounter in crafting an effective injunctive remedy in the context of executive nonaction can be overcome by seeking declaratory judgment relief. Legislators' interests are of two types: to see laws they enacted enforced and to overcome impediments to their legislative functions. The former interest should be sufficient to justify legislators' standing if the current Congress at the time of a lawsuit announces its support for enforcement of a law by authorizing litigation. The second kind of legislator interest can be found under the specific constitutional power of impeachment, exercised by the House of Representatives. This interest is present even if the House does not take a vote on impeachment, just as the Congress' oversight authority exists*

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*apart from an actual vote on a bill. Involving the judicial branch in challenges to executive action and nonaction cases has functional advantages, including providing the executive with a potentially face-saving premise to change a previous approach to enforcement or nonenforcement. Following a court determination, the House Judiciary Committee, through its impeachment authority, would serve as the monitor of whether such a change of approach has taken place.*

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## INTRODUCTION

The concept of executive action involves matters within the exclusive authority of the President which the President has the right to decide, matters where the President encroaches on the exclusive authority of the Congress, and matters for which responsibility is shared between the President and Congress. It involves both action

and inaction by the President. This Article adds to recent literature by developing, contrary to the approach of other commentators,<sup>1</sup> a theory for judicial involvement in setting the proper bounds between the executive and legislative branches. There are well-established means for a court to determine whether an executive action or inaction is lawful, and this Article offers specific drafting suggestions for Congress to enhance the likelihood of having such questions heard by a court.

Executive action has been an issue from the earliest days of our country, though recent years have presented an increasing set of examples.<sup>2</sup> The more recent controversies include President Obama commencing military involvement in Libya in 2011 for 222 days without congressional authorization;<sup>3</sup> bombing in Syria, starting in 2014 and continuing without congressional authorization;<sup>4</sup> refusing to

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1. See, e.g., Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 784–86 (2013) (arguing that in certain circumstances, executive nonenforcement is a constitutional wrong for which there is no “judicial or political” remedy); Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 517 n.49 (2012); Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 MICH. L. REV. 1195, 1201–03, 1227–30, 1244–45 (2014) (arguing that judicial remedy for executive inaction is inadequate, and favoring stronger congressional involvement in proving a checks and balances approach); William P. Marshall, *Actually We Should Wait: Evaluating the Obama Administration's Commitment to Unilateral Executive-Branch Action*, 2014 UTAH L. REV. 773, 779 (2014) (arguing that separation-of-powers constraints on the President remain constant despite the political polarization of Congress); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 680–84 (2014) (advocating for congressional involvement in the executive's decision not to act); Nat Stern, *The Indefinite Deflection of Congressional Standing*, 43 PEPP. L. REV. 1, 1–3 (2015) (arguing that congressional standing is the best way to defend against executive action and inaction). All but the Devins and Prakash article preceded the revival of legislator standing last term in the Supreme Court decision in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652, 2663–66 (2015). Suits by legislators constitute an important category of judicial enforcement of the separation of powers between the executive and legislative branches that this Article develops. See, e.g., Michael Sant'Ambrogio, *Standing in the Shadow of Popular Sovereignty*, 95 B.U. L. REV. 1869, 1872 n.6 (2015).

2. Dino P. Christenson & Douglas L. Kriner, *Political Constraints on Unilateral Executive Action*, 65 CASE W. RES. L. REV. 897, 901–03 (2015); see also Price, *supra* note 1, at 673–74.

3. See Barack Obama, *Letter from President Barack Obama to the Speaker of the House of Representatives and the President Pro Tempore of the Senate Regarding the War Powers Resolution*, WHITE HOUSE (Dec. 15, 2011), <https://www.whitehouse.gov/the-press-office/2011/12/15/letter-president-speaker-house-representatives-and-president-pro-tempore> [<https://perma.cc/C9AB-5BAB>]. U.S. military action commenced on March 19, 2011, and ceased on October 27, 2011. See *id.*

4. Tanya Somanader, *President Obama Delivers a Statement on Airstrikes in Syria*, WHITE HOUSE (Sept. 23, 2014, 10:38 AM), <https://www.whitehouse.gov/blog/2014/09/23>

deport categories of aliens who are illegally in the United States<sup>5</sup> and granting three-year work permits to persons in those categories;<sup>6</sup> declining to prosecute marijuana possession cases in states that have legalized private possession of marijuana with a strong state regulatory system;<sup>7</sup> suspending the employer mandate under the new health insurance law for the year 2014;<sup>8</sup> suspending the individual mandate for those who lost their health insurance coverage in 2014;<sup>9</sup> permitting expanded categories of Medicaid financing for low income persons in states that did not set up exchanges;<sup>10</sup> appointing members to the National Labor Relations Board during what the President, but not the Senate, considered a congressional recess;<sup>11</sup> refusing to print “Israel” as the birthplace of American citizens born in Jerusalem on their U.S. passports, though a statute required it;<sup>12</sup> and announcing a policy of nonenforcement of the sanctions regime imposed upon Iran, in connection with Iran’s agreement regarding its nuclear capability.<sup>13</sup>

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/president-obama-delivers-statement-airstrikes-syria [https://perma.cc/UK98-YVGY]. See Christenson & Kriner, *supra* note 2, at 927.

5. Alejandro Mayorkas, *Deferred Action for Childhood Arrivals: Who Can Be Considered?*, WHITE HOUSE (Aug. 15, 2012, 11:55 AM), <https://www.whitehouse.gov/blog/2012/08/15/deferred-action-childhood-arrivals-who-can-be-considered> [https://perma.cc/JX42-XUGR]; *Executive Actions on Immigration*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Apr. 15, 2015), <https://www.uscis.gov/immigrationaction> [https://perma.cc/A3YK-NG5A].

6. *Executive Actions on Immigration*, *supra* note 5.

7. See Memorandum from James M. Cole, Deputy Att’y Gen., U.S. Dep’t of Just., to All U.S. Att’ys (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [https://perma.cc/7G7B-ZT4U].

8. I.R.S. Notice 2013-45, 2013-31 I.R.B. 116 (July 29, 2013). See Price, *supra* note 1, at 752.

9. OPTIONS AVAILABLE FOR CONSUMERS WITH CANCELLED POLICIES, CTRS. FOR MEDICARE & MEDICAID SERVS., DEP’T OF HEALTH & HUMAN SERVS. (2013), <https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/cancellation-consumer-options-12-19-2013.pdf> [https://perma.cc/NBG3-UD4R]. See Price, *supra* note 1, at 750.

10. King v. Burwell, 135 S. Ct. 2480, 2487 (2015) (“The IRS addressed the availability of tax credits by promulgating a rule that made them available on both State and Federal Exchanges. As relevant here, the IRS Rule provides that a taxpayer is eligible for a tax credit if he enrolled in an insurance plan through ‘an Exchange,’ which is defined as ‘an Exchange serving the individual market . . . regardless of whether the Exchange is established and operated by a State . . . or by HHS[.]’”) (first quoting 26 C.F.R. § 1.36B-2 (2013); then quoting 45 C.F.R. § 155.20 (2014); and then citing 77 Fed. Reg. 30,377, 30,378 (2012)).

11. NLRB v. Noel Canning, 134 S. Ct. 2550, 2557 (2014).

12. Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, § 214(d), 116 Stat. 1350, 1366. See Zivotofsky ex rel. Zivotofsky v. Clinton, 132 S. Ct. 1421, 1425 (2012).

13. President Barack Obama, Statement by the President on Iran (July 14, 2015), in WHITE HOUSE, THE IRAN NUCLEAR DEAL: WHAT YOU NEED TO KNOW ABOUT THE

Earlier examples of executive action involved significant controversy. These included President Truman's seizure of America's steel mills during the Korean War;<sup>14</sup> President Nixon's impoundment of funds authorized and appropriated by Congress;<sup>15</sup> President Franklin Roosevelt's sale of U.S. warships to Great Britain in return for leases on British territories in the Western Hemisphere, despite a congressional requirement of neutrality before America entered World War II;<sup>16</sup> President Franklin Roosevelt's extinguishing of claims of American citizens against the Soviet Union, as an effort to normalize relations with USSR;<sup>17</sup> President Reagan's invasion of Grenada without congressional authorization;<sup>18</sup> President George H.W. Bush's invasion of Panama without Congressional authorization;<sup>19</sup> and President Clinton's bombing of Yugoslavia for seventy-nine days in 1999 without congressional authorization.<sup>20</sup>

As evidenced by these examples, controversial executive action and nonaction can be drawn from both international and domestic contexts.<sup>21</sup>

The structure of Justice Jackson's famous concurrence in the *Steel Seizure*<sup>22</sup> case forms the outline for this Article's consideration

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JCPOA, [https://obamawhitehouse.archives.gov/sites/default/files/docs/jcpoa\\_what\\_you\\_need\\_to\\_know.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/jcpoa_what_you_need_to_know.pdf) [<https://perma.cc/TS2X-6QYX>].

14. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 582 (1952).

15. *Train v. City of New York*, 420 U.S. 35, 40 (1975).

16. This use of executive power is aptly described by the passage that follows:

Then on September 3 [, 1940,] it was announced that the United States had entered into an agreement under which, in return for the lease of certain sites for naval bases in the British west Atlantic, our government had handed over to Britain fifty overage destroyers which had been recently reconditioned and recommissioned. Although the transaction was directly violative of a least two statutes and represented an exercise by the President of a power which by the Constitution is specifically assigned to Congress, it was defended by Attorney General, now Justice, Jackson as resting on the power of the President as Commander-in-Chief to 'dispose' the armed forces of the United States which was ingeniously, if not quite ingenuously, construed as the power to 'dispose of' them!

EDWARD S. CORWIN, *THE PRESIDENT, OFFICE AND POWERS* 288–89 (3d ed. 1948) (footnote omitted).

17. *United States v. Belmont*, 301 U.S. 324, 326–27 (1937).

18. *U.S. Relations with Grenada Fact Sheet*, U.S. DEP'T OF STATE (Nov. 10, 2015), <http://www.state.gov/r/pa/ei/bgn/2335.htm> [<https://perma.cc/5NS4-5BDJ>].

19. *U.S. Relations with Panama Fact Sheet*, U.S. DEP'T OF STATE (July 29, 2015), <http://www.state.gov/r/pa/ei/bgn/2030.htm> [<https://perma.cc/PG7J-5G2P>].

20. See *Campbell v. Clinton*, 203 F.3d 19, 19 (D.C. Cir. 2000).

21. For more examples from the Ronald Reagan and George W. Bush administrations, see Zachary S. Price, *Politics of Nonenforcement*, 65 CASE W. RES. L. REV. 1119, 1125–33 (2015).

of executive action: Within the Constitution, there are areas uniquely committed to the executive branch, areas uniquely committed to the legislative branch, and areas of shared authority. Part I discusses the areas of exclusive authority to the President and Part II discusses the areas of exclusive authority to the legislative branch. After a brief consideration of the first two areas, this Article, in Part III, devotes most attention to the third: where legislative and executive authority overlap. Under that heading, the area of most interest is where Congress has passed a law, but the President chooses not to enforce it. Part IV addresses the question of which remedies are available in that circumstance and concludes that, among other possible remedies, declaratory judgment relief would cover the broadest range of circumstances and would satisfy federal court justiciability requirements. Part V next considers who would have standing to bring such an action. Private parties who were aggrieved would certainly qualify, but they would not be present in many cases. Thus, the issue of legislative standing is presented. The Supreme Court has very recently confirmed its standard for legislative standing, in a phrasing that would support legislative branch standing either to sue to compel the executive branch to enforce the law, or at least to obtain a declaratory judgment that the President's failure to enforce the law was indefensible. The premise for legislative standing in such a legal action is bolstered by reference to the specific power of impeachment, given to the House of Representatives, even if formal impeachment proceedings are not commenced. The resort to judicial remedies should lead to less confrontational means of resolving interbranch disputes with the enhanced possibility of face-saving withdrawals by each branch from an extreme position. A brief conclusion follows.

#### I. INHERENTLY EXCLUSIVE AUTHORITY OF THE PRESIDENT

Among the most common assertions of inherent power by the President have been those under his commander-in-chief authority, such as initiating the use of America's armed forces in the absence of a congressional declaration of war, and especially asserting power in regard to the President's conduct of a war once declared.<sup>23</sup>

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22. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 635–37 (1952) (Jackson, J., concurring).

23. The power given to the President once war is declared is quite broad:

A declaration of war didn't tell the president how to fight the enemy, or how vigorously, or even when to begin: All it did was declare that we were at war with

Nevertheless, challenges to the President's assertion of inherent authority in this realm date to the earliest days of our country. President George Washington announced a policy of neutrality in the war between France and Great Britain; then-Congressman James Madison challenged his right to do so, since, he argued, the closest analogous power was the right to declare war, and that was vested exclusively in the Congress.<sup>24</sup> Alexander Hamilton defended the President's inherent rights in a manner that Madison characterized as monarchical—in a literal sense—Hamilton, he claimed, had to derive the President's inherent rights from the powers the United States inherited from the British Crown, which inhered in the President unless specifically granted to Congress<sup>25</sup>:

Washington's so-called "Proclamation of Neutrality" upon the outbreak early in 1793 of war between France and Great Britain... declared the intention of the United States to "pursue a course friendly and impartial to both belligerent powers'.... In brief, Hamilton's argument comprises the following contentions: first, that the opening clause of Article II is a grant of power; secondly, that the succeeding more specific grants of the article, except when 'coupled with express restrictions or limitation," "specify the principal articles" implied in the general grant and hence serve to interpret it; thirdly—by inference—that the direction of foreign policy is inherently an "executive" function.... [Madison] proceeds to charge Hamilton with seeking to annex to the Presidency the prerogative of the British Crown.... Madison's own theory is that the right to determine the foreign policy of the United States devolves upon Congress by virtue of its power to declare war.<sup>26</sup>

The inherent rights of the Presidency prevail not only where Congress is silent, as it was at the time of President Washington's

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one or more enemies and leave the "how" up to him. Indeed, had it done more than that it would at least have flirted with unconstitutionality, as it was the point of the Commander in Chief Clause to keep Congress out of day-to-day combat decisions once it had authorized the war in question.

JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 25 (1993) (footnote omitted). *See also id.* at 142–43 n.22.

24. *See* CORWIN, *supra* note 16, at 217–19.

25. *Id.*

26. *Id.* (citations omitted).



Proclamation of Neutrality,<sup>27</sup> but also when Congress attempts to legislate within the area of the Presidential reserve.<sup>28</sup> Even when they sign laws, Presidents do not appear to feel bound by those provisions that impinge on their exclusive authority, and they will issue signing statements expressing that they reserve the right not to obey some part of the law.<sup>29</sup> That happened, for instance, in connection with the federal law giving children born of U.S. citizen parents in Jerusalem the right to have their passports record their place of birth as “Jerusalem, Israel.”<sup>30</sup> Since this assertion of congressional authority impinged on the President’s inherent authority to recognize foreign states, and to carry on diplomacy with them, the law was held unconstitutional.<sup>31</sup>

This kind of a conflict might soon recur, should President Obama’s normalization of relations with Cuba extend to extinguishing the claims of those whose property was nationalized by the Communist government. In 1996, Congress passed the Helms-Burton Act, ensuring that private parties whose property was nationalized by the Castro regime in Cuba could sue in federal court to prevent the transfer of such property to other parties.<sup>32</sup> Since Congress has control over the jurisdiction of federal courts, it had authority to do so.<sup>33</sup> By creating rights in third parties with access to courts to enforce those rights, Congress gave a forum to private parties with standing to vindicate Congress’ point of view regarding the communist regime in Cuba. However, in the context of the Soviet Union, sixty years before, the Court found in the President’s inherent authority the right to extinguish private claims to assets seized by the

27. A year later, Congress passed a Neutrality Act. Neutrality Act, Act of June 5, 1794, ch. 50, 1 Stat. 381, *repealed by* Act of April 20, 1818, ch. 88, 3 Stat. 447, 450; CORWIN, *supra* note 16, at 220.

28. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring).

29. See Sofia E. Biller, Note, *Flooded by the Lowest Ebb: Congressional Responses to Presidential Signing Statements and Executive Hostility to the Operation of Checks and Balances*, 93 IOWA L. REV. 1067, 1070, 1075–81 (2008); Malinda Lee, Comment, *Reorienting the Debate on Presidential Signing Statements: The Need for Transparency in the President’s Constitutional Objections, Reservations, and Assertions of Power*, 55 UCLA L. REV. 705, 709–18 (2008).

30. See, e.g., George W. Bush, Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003, in 2 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, GEORGE W. BUSH 1697–98 (Sept. 30, 2002) (regarding the federal law at issue in *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015)).

31. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2096 (2015).

32. Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996; Pub. L. No. 104-114, 110 Stat. 785 (codified at 22 U.S.C. §§ 6082–85 (2012)) (Helms-Burton Act).

33. U.S. CONST. art. III, § 2.

Soviets in the Russian Revolution.<sup>34</sup> If the Court followed that precedent, the Helms-Burton Act would be held unconstitutional to the extent it purported to prevent the President from undertaking this aspect of diplomacy.

The President's claim to inherent authority is sometimes upheld because of the difficulty a court would have doing otherwise, in a practical sense. When President Carter terminated the Mutual Defense Treaty with the Republic of China (Taiwan), at the same time recognizing the People's Republic of China, Senator Goldwater and congressional colleagues (with an authorization from a majority of the Senate) sued to enjoin President Carter's actions, claiming that since the treaty's adoption required ratification by two-thirds of the Senate, its abrogation would too.<sup>35</sup> The district court accepted Senator Goldwater's reasoning.<sup>36</sup> The D.C. Circuit reversed per curiam, recognizing both presidential and senatorial prerogatives, but holding the former prevailed since there was no explicit constitutional grant to the Senate regarding terminating treaties.<sup>37</sup> The U.S. Supreme Court granted certiorari, vacated the opinion, and ordered the case dismissed, without opinion.<sup>38</sup>

We can only speculate what grounds would have been furnished had the Supreme Court issued a full opinion. In addition to the reasoning of the D.C. Circuit that the President's inherent diplomatic authority required maximum deference, this Article offers the pragmatic concern of how a court would structure relief. Once a treaty has been ratified, to what extent the United States abides by its

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34. *United States v. Belmont*, 301 U.S. 324, 326–27 (1937) (upholding the President's executive agreement with the Soviet Union terminating private ownership in assets located in New York). The President's action was given precedence over New York's public policy against confiscation of property: “[n]o state policy can prevail against the international compact here involved.” *Id.* at 327.

35. A statute, passed by both houses of Congress, would also be sufficient, in the plaintiffs' view. *Goldwater v. Carter*, 481 F. Supp. 949, 950 (D.D.C. 1979), *rev'd*, 617 F.2d 697 (D.C. Cir. 1979) (en banc), *vacated*, 444 U.S. 996 (1979) (mem.).

36. *Id.*

37. The court described that

[t]he constitutional institution of advice and consent of the Senate, provided two-thirds of the Senators concur, is a special and extraordinary condition of the exercise by the President of certain specified powers under Article II. It is not lightly to be extended in instances not set forth in the Constitution. Such an extension by implication is not proper unless that implication is unmistakably clear.

*Goldwater v. Carter*, 617 F.2d 697, 704 (D.C. Cir. 1979) (en banc), *vacated*, 444 U.S. 996 (1979) (mem.).

38. *Goldwater v. Carter*, 444 U.S. 996, 996 (1979) (mem.).

obligations to another country is a matter entrusted to the President (in the absence of a self-executing provision creating enforcement rights in third parties). For diplomatic purposes, our country might wish to be more or less vigilant in adhering to treaty provisions, as relations with the other country change over time. It would have been impractical, therefore, to implement the following order entered by the district court:

In view of the foregoing, it is the declaration of this Court that the President's notice of termination must receive the approval of two-thirds of the United States Senate or a majority of both houses of Congress for it to be effective under our Constitution to terminate the Mutual Defense Treaty of 1954. It is further ordered that the Secretary of State and his subordinate officers are hereby enjoined from taking any action to implement the President's notice of termination unless and until that notice is so approved.<sup>39</sup>

If, following the district court's order, the Secretary of State simply stopped staffing the U.S. embassy in Taipei, what could the district court do? Could it order a skeleton crew to arrive? Could it order the U.S. ambassador to take up residence there? If the ambassador had left (pursuant to President Carter's order), could the district court order the President to nominate a replacement?<sup>40</sup> The practical difficulties associated with enforcing the district court's order reveal the sound logic of holding that the decision to abide by a treaty is within the exclusive purview of the President.<sup>41</sup>

The assertion of inherent executive authority does not always succeed, of course. Most famously, President Truman asserted his right as commander in chief to nationalize our nation's steel mills when a strike and lock-out were threatened.<sup>42</sup> The Supreme Court held that labor strife involved interstate commerce, an area of shared responsibility between the President and Congress, and that Congress

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39. *Goldwater*, 481 F. Supp. at 965 (footnote omitted).

40. By contrast, where a treaty provides that the United States (through the executive branch) shall *not* undertake a particular action, an injunction sought by a U.S. senator to prevent that action from taking place could be more easily ordered. Perhaps that was why the district court raised no impediment based on lack of standing to Senator Dole's lawsuit to prevent the return of the Crown of Saint Stephen to Hungary, though ruling against him on the merits. *See Dole v. Carter*, 444 F. Supp. 1065, 1067–68 (D. Kan. 1977).

41. The difficulty of drafting a judicial remedy reoccurs in the context of shared power, where Congress has acted and the President has chosen not to enforce a law passed by Congress. This Article argues below that a declaratory judgment can be an effective remedy in such cases. *See infra* Section IV.C.

42. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 582 (1952).

had occupied the field with the Taft-Hartley Act.<sup>43</sup> The characterization of the power in question determined that outcome. Had the Court instead characterized Truman's action as that of the commander in chief in connection with conducting a war, the outcome would likely have been to uphold his actions, as in the Jerusalem passport case.<sup>44</sup>

## II. INHERENTLY EXCLUSIVE CONGRESSIONAL AUTHORITY

Similarly, Congress possesses inherent authority that may not be exercised by the President. Among those powers is the authority to present the President with a single piece of legislation, to which the President's assent or veto is then applied. Giving the President the right to break up that legislation, as it was crafted by the Congress, into some pieces he would approve and others he would not (through exercise of the line-item veto) has been held to take the power of crafting a single legislative instrument away from Congress.<sup>45</sup>

Confirming or rejecting Presidential appointments is another prerogative of Congress—in this case, the Senate.<sup>46</sup> If an individual exercises executive authority, and cannot be characterized as merely ministerial,<sup>47</sup> then the Senate has the prerogative to confirm or reject that individual's appointment. This was the basis of Senator Riegle's unsuccessful lawsuit against the Federal Reserve's Federal Open Market Committee, which includes not only the governors of the Federal Reserve system, who are appointed by the President and subject to Senate approval or rejection, but also representatives of five of the member federal reserve banks, elected by their own boards and not confirmed by the Senate.<sup>48</sup> If those member bank

43. *Id.* at 585–86.

44. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2096 (2015).

45. *Clinton v. City of New York*, 524 U.S. 417, 436–49 (1998) (arguing that the line item veto takes the power from Congress to present a single piece of legislation to the President since the President used the line item veto to invalidate portions of the law, and ruling that this power is unconstitutional as it is one which the Constitution did not grant to the President).

46. For an example of a claim raised by the House of Representatives under its powers separate from those of the Senate, see *Sissel v. U.S. Dep't of Health & Human Servs.*, 951 F. Supp. 2d 159, 166–74 (D.D.C. 2013), *aff'd*, 760 F.3d 1 (D.C. Cir. 2014), *cert. denied*, 136 S. Ct. 925 (2016) (dismissing claims that President Obama's Patient Protection and Affordable Care Act law operates as a tax that did not originate in the House).

47. U.S. CONST. art. II, § 2 (excluding only "inferior Officers," whose appointment would not require Senate confirmation).

48. *Riegle v. Fed. Open Mkt. Comm.*, 656 F.2d 873, 874–77 (D.C. Cir. 1981). See BD. GOVERNORS FED. RES. SYS., FEDERAL OPEN MARKET COMMITTEE, <https://www.federalreserve.gov/monetarypolicy/fomc.htm> [<https://perma.cc/BL4F-8SC7>] (last updated Jan. 26, 2016).

representatives exercise executive authority through the Federal Reserve Open Market Committee, then Senator Riegle argued that they should then have been appointed by the President and made subject to Senate confirmation, under Article II, section 2, of the Constitution.<sup>49</sup>

Sometimes Congress willingly attempts to give away its power to the executive branch. The nondelegation doctrine, however, stands for the proposition that the Congress may not give away its inherent right to legislate.<sup>50</sup> Though applications of the doctrine in majority opinions of the Supreme Court have not occurred in recent years, the non-delegation doctrine remains an important principle that individual justices and lower federal courts have not abandoned.<sup>51</sup> It holds that Congress cannot constitutionally give to an executive agency the authority to promulgate regulations having the force of law without constraining the agency's discretion at least in broad ways.<sup>52</sup>

49. *Riegle*, 656 F.2d at 874–77.

50. The Supreme Court has made this explicit: “Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable . . .” *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537–38 (1935). *But see* *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 327–29 (1936) (upholding presidential action in foreign affairs under a very broad delegation of congressional authority).

51. This point is supported by Jeffrey Bossert Clark:

While Professor Sunstein is fond of pointing out that the nondelegation doctrine has had only one good year—1935—because that was the only year in which the Supreme Court has ever invalidated any statutes under the doctrine, it is simply not true that the doctrine has been entirely dormant ever since the 1937 “switch in time that saved nine.” In the so-called Benzene Case, a plurality of Justices led by that latter-day fellow traveler of the Four Horsemen, Justice Stevens, construed the Occupational Safety and Health Act of 1970 to avoid nondelegation problems. Then-Justice Rehnquist, in a concurrence, would have gone farther and simply declared the statute unconstitutional, rather than attempting to save it. The simple point, however, is that given Benzene, it is just not true that the nondelegation doctrine is dead, or that it is the product of a fringe on the new judicial right. After Benzene, in a careful and scholarly opinion, Judge Williams of the D.C. Circuit, applied the nondelegation doctrine to the so-called Lockout/Tagout case, invalidating and remanding certain rules issued by the Occupational Safety & Health Administration (OSHA).

Jeffrey Bossert Clark, *The Recent Controversy over the Non Delegation Doctrine*, 3 ENV'T'L. & PROP. RTS. PRAC. GROUP NEWSL., (The Federalist Society for Law & Public Policy Studies), Summer 1999 (footnotes omitted), <http://www.fed-soc.org/publications/detail/the-recent-controversy-over-the-non-delegation-doctrine> [<https://perma.cc/M5B7-SHP2>]. *But see* THE EFFECTIVE DEMISE OF THE NONDELEGATION DOCTRINE, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, S. DOC. NO. 103-6, at 78–89 (1992).

52. *See* *Am. Trucking Ass'ns, Inc. v. EPA*, 175 F.3d 1027, 1038 (D.C. Cir. 1999).

Another recent example of Congress asserting its exclusive prerogatives is the House of Representatives' suit against the Department of Health and Human Services for giving subsidies to insurance companies offering discounted health care policies under President Obama's Patient Protection and Affordable Care Act ("ACA").<sup>53</sup> The district court upheld the House's view that there has been no appropriation for this expenditure, as required by the U.S. Constitution.<sup>54</sup> This assertion goes to the heart of a congressional prerogative: the power of the purse.<sup>55</sup>

If the President purports to exercise authority that cannot lawfully be taken away from the Congress, the remedy is straightforward: a party suffering individualized harm from the President's action can bring an action to enjoin it.<sup>56</sup>

### III. SHARED POWER BETWEEN CONGRESS AND THE PRESIDENT

Areas of overlapping authority between the President and Congress exist, either by the explicit structure of the Constitution or where Congress has delegated authority to the President. An example of the former is the overlap between Congress' power to declare war<sup>57</sup> and the President's power to wage the war as commander in chief.<sup>58</sup> Examples of the latter, delegated authority, include some very broad and some very detailed delegations. A broad delegation was contained in the congressional joint resolution passed after the September 11, 2001, attacks. The U.S. Congress conveyed the full extent of its shared authority to the President, without any expiration date, and without a specific identification of the parties or states

53. *U.S. House of Representatives v. Burwell*, 185 F. Supp. 3d 165, 189 (2016) (granting summary judgment in favor of the House); *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53, 58 (2015) (granting the House standing in part at the motion to dismiss phase). *See also* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified in scattered sections of the 42 U.S.C.).

54. *See Burwell*, 130 F. Supp. 3d 53, 58 (D.D.C. 2015) (granting standing to the House to proceed); *see also* U.S. CONST. art. I, § 9, cl. 7 ("No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.").

55. *See* S. DOC. NO. 103-6, at 156.

56. Though unsuccessful on the merits, an example of such congressional claims includes House members' attempts to stop President Carter from turning over property to Panama in the Panama Canal Zone. *Edwards v. Carter*, 580 F.2d 1055, 1055-56 (D.C. Cir. 1978). These attempts were allegedly in violation of the U.S. Constitution's article IV, section 3, cl. 2 requirement that property of the United States be disposed of by Congress, not simply pursuant to a treaty ratified by the Senate, which was only one part of Congress. *Id.*

57. U.S. CONST. art. I, § 8, cl. 11.

58. U.S. CONST. art. II, § 2, cl. 1.

against whom that power could be used.<sup>59</sup> An example of a very narrow delegation is the 1973 War Powers Act,<sup>60</sup> which became law in a very different historical context—the Vietnam conflict. Under that statute, the President has detailed obligations to inform Congress about the insertion of U.S. military into hostilities, and then to withdraw U.S. military after sixty days, barring explicit authorization by Congress.<sup>61</sup> Similarly, in the case of Iran’s pursuit of nuclear weapons, Congress had imposed sanctions, but allowed the Secretary of the Treasury to waive them when in the national interest.<sup>62</sup> This shared power made it possible for President Obama to reach agreement with Iran, but did not effectuate a permanent change in law. Hence, President Trump can order the Secretary of the Treasury to revoke the waiver.<sup>63</sup>

In the domestic sphere, a recent example of broad delegation of authority is the Dodd-Frank Act, enacted after the Wall Street collapse of 2008.<sup>64</sup> There are 398 specific calls in the statute for regulatory agencies, including the newly created Consumer Financial Protection Bureau, to issue rules, interpreting vague concepts such as “unfairness” by financial institutions, and “systemic risk.”<sup>65</sup> Under this authority, the executive branch has stretched to address problems totally unconnected with the 2008 financial crisis, including whether banks show racial patterns in the rates they charge for car loans and the tuition charged by for-profit colleges.<sup>66</sup> A contrasting example,

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59. The language of this authorization declared that

the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons . . . [T]he Congress declares that this section is intended to constitute specific statutory authorization within the meaning of . . . the War Powers Resolution.

Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 Stat. 224, 224 (2001).

60. War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§ 1541–48 (2012)).

61. 50 U.S.C. §§ 1542–1544 (2012).

62. 22 U.S.C. § 8513(f) (2012).

63. *Id.*

64. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S.C.).

65. See Peter J. Wallison, Opinion, *Four Years of Dodd-Frank Damage*, WALL ST. J., July 21, 2014, at A13.

66. Steven Davidoff Solomon, *Protection Bureau’s Stormy Path to Reform the Auto Finance Industry*, N.Y. TIMES, Dec. 2, 2015, at B5. Whether so broad a stretch could break the limits set by the nondelegation doctrine depends on whether Dodd-Frank can be said

where Congress limited the role of the President in an area of shared power, was the *Steel Seizure* case: the executive could deal with impending labor strife only by the specific tools provided in the Taft-Hartley Act to handle strikes with national impact.<sup>67</sup>

A. *The President Acts, Congress Does Not*

Where, in an area of constitutional federal authority, no statute has been passed, the President is free to act.<sup>68</sup> In *Chenoweth v. Clinton*,<sup>69</sup> Congresswoman Chenoweth and three colleagues asserted that the President could not act in an area where Congress might have acted, but decided not to do so: designating certain rivers as historically significant and in need of preservation.<sup>70</sup> She was denied standing for lack of a particularized harm.<sup>71</sup> If a private party with sufficient standing had been the plaintiff, the likely outcome would have been against the plaintiff. It might be that the President's action in a space of Congressional nonaction stimulates a legislative response; but until that happens, the President's policy prevails in the shared space.

As another example, a President might choose to designate a national monument over an area that had been considered, but rejected, for "National Park" status by Congress.<sup>72</sup> It is unwise to infer from Congress' decision not to proceed in any given area that Congress does not wish the President to act. Indeed, it is difficult to infer anything from congressional nonaction. The decision not to proceed might reflect the existence of more pressing business, or simply that the individual leading the legislative initiative was not popular with colleagues.

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to provide an "intelligible principle" for the Consumer Financial Protection Bureau to use in asserting authority over the practices mentioned. *See* S. DOC. NO. 103-6, at 78 (1992).

67. Labor Management Relations Act, Pub. L. No. 80-101, §§ 202, 209, 61 Stat. 136, 153, 155-56 (1947) (codified as amended at 29 U.S.C. §§ 172, 178 (2012)); *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 585-86 (1952).

68. *Cf. Steel Seizure*, 343 U.S. at 637 (Jackson, J., concurring) ("When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least, as a practical matter, enable, if not invite, measures on independent presidential responsibility.").

69. *Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999).

70. *Id.* at 112-13.

71. *Id.* at 117.

72. Robert W. Righter, *National Monuments to National Parks: The Use of the Antiquities Act of 1906*, 20 WESTERN HIST. Q. 281, 281-82 (1989). *See* National Monuments Act, 54 U.S.C. § 320301(a) (2012).



*B. Congress Acts and the President Acts*

In an area of shared responsibility, it is critical to ascertain whether Congress intended to fully occupy the field.<sup>73</sup> The degree of detail in a statute is one indicator of Congress' desire to exclude the executive.<sup>74</sup> The War Powers Act, for instance, does so in stating

[t]he constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.<sup>75</sup>

In other words, without action by Congress (clauses one and two), the President cannot act unless there has been an attack on the United States.

The constitutionality of the War Powers Act has never been determined,<sup>76</sup> but its structure and language leave no doubt of Congress' intent to "occupy the field" of initiating military operations. In other statutes less clear than the War Powers Act, however, congressional intent to occupy the field might need to be clarified by adding the following template:

The structure of this act is intended to be the exclusive means for dealing with [fill in the subject area], excluding the President and executive agencies from taking actions not explicitly authorized to be taken by them in this act to the maximum extent constitutionally permissible.

Had such language been included in President Obama's ACA, the Supreme Court decision regarding Medicaid subsidies to states

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73. *Steel Seizure*, 343 U.S. at 637–38, 637 n.4 (Jackson, J., concurring).

74. In the *Steel Seizure* case, the Court relied on the fact that Congress had addressed the problem that might necessitate seizure of private assets in two statutes: the Selective Service Act of 1948 and the Defense Production Act of 1950. *See id.* at 586. It was also important that Congress dealt with labor disputes in another, the Labor Management Relations Act. *See id.* The Court considered it determinative that none of them granted the President the power he was asserting in the case before the Court. *See id.* at 586.

75. 50 U.S.C. § 1541(c) (2012).

76. The statute is, I believe, a workable compromise between the Congress' right to declare war and the President's right to wage war, and to defend against attacks as commander in chief. The statute was passed over President Nixon's veto, *see Campbell v. Clinton*, 203 F.3d 19, 28–29 (D.C. Cir. 2000) (Silberman, J., concurring), and Presidents since then have asserted its unconstitutionality.

that did not set up their own exchanges would almost certainly have been different.<sup>77</sup> In that case, the Court was left with conflicting signals. The statute appeared to require that a state set up an exchange in order to receive federal financial help for its lower income residents. Indeed, that conclusion was famously suggested as the intended purpose for the conditional language—to induce states to create exchanges since the federal government could not directly compel them to do so.<sup>78</sup> However, the majority found that the overwhelming purpose of the ACA was to foster maximum participation of the population in health insurance coverage, which would be encouraged by subsidies to the states.<sup>79</sup> In light of that goal, the predicate of having an exchange was not required for a state to receive a subsidy.<sup>80</sup> The statutory template this Article proposes above could have removed this ambiguity between the Act’s purpose and its structure.

Of course, Congress may wish to invite expansive executive activity by explicitly calling for executive branch regulations, as in the Dodd-Frank statute discussed above, or by drafting the governing law in the broadest terms.<sup>81</sup> If this is Congress’ intent, then it would not use the template language this Article proposed.<sup>82</sup>

### C. *Congress Acts, the President Does Not*

The President has authority to allocate scarce enforcement resources, as in choosing whom to prosecute in the criminal field,<sup>83</sup> or

77. See generally *King v. Burwell*, 135 S. Ct. 2480 (2015) (interpreting the Affordable Care Act’s exchange provisions, after determining that they were ambiguous, as requiring tax credits for insurance purchased on any exchange, both state and federal).

78. See, e.g., Avik Roy, *Contrary to White House Denials, Emails Show Jonathan Gruber Was “Integral” to Obamacare*, FORBES (June 21, 2015, 11:03 PM), <http://www.forbes.com/sites/theapothecary/2015/06/21/contrary-to-white-house-denials-emails-show-jonathan-gruber-was-integral-to-obamacare/#548ec59111bf> [<https://perma.cc/H5GJ-34L3>].

79. *King v. Burwell*, 135 S. Ct. at 2492–93.

80. *Id.* at 2495–96.

81. See, e.g., Federal Trade Commission Act of 1914, Pub. L. No. 63-203, § 5, 38 Stat. 717, 719–20 (codified as amended at 15 U.S.C. § 45 (2012)) (prohibiting in broad terms “unfair methods of competition”). Whether in case-by-case adjudication, or in promulgating rules, the Federal Trade Commission was expected by Congress to be filling in what “unfair” meant.

82. Congress might also prefer to let the courts develop a sort of common law to implement its broad policy goals. The antitrust laws are such examples. See Donald Dewey, *The Common-Law Background of Antitrust Policy*, 41 VA. L. REV. 759, 759 (1955).

83. *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (“Finally, we recognize that an agency’s refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the

using discretion in the administrative law context, contemplated by the specification of its opposite—“abuse of discretion,” in the Administrative Procedure Act (“the APA”).<sup>84</sup> What principle can be used to distinguish permissible executive discretion from circumstances that could be the basis of a successful challenge?<sup>85</sup> The key is to determine whether the structure of the law written by Congress was undermined by the executive’s nonaction.<sup>86</sup>

One can imagine instances where selective executive branch nonenforcement destroys the law’s structure. For instance, the National Labor Relations Act was amended in 1947 to extend the National Labor Relations Board’s authority to outlaw unfair labor practices to reach such practices by labor unions.<sup>87</sup> From its passage in

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Executive who is charged by the Constitution to ‘take Care that the Laws be faithfully executed.’” (quoting U.S. CONST. art. II, § 3)).

84. Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2012).

85. One answer to the question is this

[i]f the core executive function is to apply general laws to particular cases, the central legislative task is to formulate general laws and policies for the executive and judicial branches to implement. The executive branch thus exceeds its proper role, and enters the legislature’s domain, if without proper congressional authorization it uses enforcement discretion to categorically suspend enforcement or to license particular violations.

Price, *supra* note 1, at 676.

86. This allows for the conclusion that “policies that amount in practice to a prospective guarantee of nonenforcement to broad categories of offenders should be presumptively improper.” Price, *supra* note 21, at 1137. For examples of where nonenforcement undermines the basic policy of the statute in the context of President Obama’s ACA, see Price, *supra* note 1, at 750–54. Professor Price contrasts this kind of nonenforcement from a decision “to turn a blind eye to some violations so as to concentrate on others—that is, to set priorities for enforcement without altering the basic policy of the statute.” Price, *supra* note 21, at 1137.

A slightly different formulation, by Professor Sant’Ambrogio, calls the President’s nonaction into question if Congress has spoken clearly in favor of enforcement, and the President has chosen to “completely abandon the enforcement of the statute.” Michael Sant’Ambrogio, *The Extra-Legislative Veto*, 102 GEO. L.J. 351, 397 (2014). Professor Sant’Ambrogio writes:

[T]he Executive cannot use its enforcement discretion to wholly abdicate its responsibilities under the statute. As the Court explained in *Chaney*, the presumption against reviewability does not apply when the agency has “‘consciously and expressly adopted a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities.”

*Id.* at 395 (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc)).

I believe Sant’Ambrogio’s formulation, while true to the language of *Chaney*, is a bit too forgiving. The structure of a statute could be undermined by selective enforcement, as well as by completely abandoning enforcement.

87. Labor-Management Relations (Taft-Hartley) Act, ch. 120, sec. 101, § 8(b), 61 Stat. 136, 141–42 (1947) (codified as amended at 29 U.S.C. § 158(b) (2012)).

1935 until the Taft-Hartley Act in 1947, the Act had only identified unfair labor practices by employers.<sup>88</sup> If a National Labor Relations Board followed a policy of only pursuing unfair labor practices by employers today, it would eviscerate the balance sought by Congress in 1947. This would not be an instance of marshalling scarce enforcement resources towards the highest priorities; it would be an undoing of the balance within the congressional scheme.

Another hypothetical of impermissible nonenforcement is for a President, with a strong pro-investor point of view, to order the Internal Revenue Service (“the IRS”) not to pursue taxpayers for omitting to pay tax on capital gains. It would be entirely permissible for the IRS to pursue large tax evaders over smaller ones, but to exclude a class of income covered by the Internal Revenue Code from effective taxation entirely would destroy the structure of that statute.

An illustration of where nonenforcement does not undermine the structure of a statute is the Obama administration’s decision not to devote scarce law enforcement resources to prosecute marijuana possession in states where such possession is legal under state law.<sup>89</sup> While Congress has outlawed marijuana possession, it does not violate the congressional scheme for the President to choose to enforce the law in states where the assistance of local law enforcement is more forthcoming. The President might be involved in selective prosecution, but not in a way contrary to the congressional scheme.<sup>90</sup>

A more complex case involves the decision by a President simply not to enforce some laws at all rather than mere selective prosecution. Does this undermine the congressional scheme in enacting the law? Consider an example: neither the U.S. Department of Justice, which is under the President’s direction, nor the Federal Trade Commission, an independent agency, has since 2000 brought an action against a

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88. *1947 Taft-Hartley Passage and NLRB Structural Changes*, NAT’L LAB. REL. BOARD, <http://www.nlr.gov/who-we-are/our-history/1947-taft-hartley-passage-and-nlr-structural-changes> [<https://perma.cc/3DQV-LPG5>] (stating that “[u]nder the Wagner Act, there were only employer unfair labor practices”).

89. See generally Memorandum from James M. Cole, *supra* note 7 (explaining this decision).

90. See Price, *supra* note 1, at 757. The contrary argument would be that Congress considered transportation of marijuana between states to be of particular concern, so that nonenforcement anywhere undermined the overall fabric of enforcement. This view was also voiced by the Department of Justice, focusing on “preventing the diversion of marijuana from states where it is legal under state law in some form to other states.” Memorandum from James M. Cole, *supra* note 7.

wholesaler for discriminating in price among retailers.<sup>91</sup> Each agency considers enforcing the Robinson-Patman Act, which outlaws such discriminatory pricing behavior,<sup>92</sup> a very low priority, especially since private enforcement is available for parties who can show they were harmed in a way that damaged competition.<sup>93</sup> Hence, the executive branch's failure to enforce the Robinson-Patman Act does not eviscerate congressional intent in outlawing price discrimination: at least some victims can sue in their own right.

These examples aid us in analyzing the actual case of the Obama administration's actions deferring deportation of whole categories of individuals. Congress enacted a comprehensive immigration policy, identifying categories of persons entitled to apply for permanent residency.<sup>94</sup> In sequential executive pronouncements, the Obama administration stated it would not deport children illegally brought into this country by their parents, and it would not deport parents of children born in this country, though the parents had entered illegally.<sup>95</sup>

Congress had enacted a complex scheme to identify which aliens could apply for legal residency. The President treated those categories as nonexhaustive: the categories of aliens that Congress sought to protect would be allowed to stay, but the President proposed to protect others, too.<sup>96</sup> The states suing President Obama, by contrast, argued that Congress intended to occupy the field of which aliens could stay in America,<sup>97</sup> so that the President's failing to

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91. AM. BAR ASS'N, ANTITRUST LAW DEVELOPMENTS 497-98 (7th ed. 2012) ("While the Federal Trade Commission (FTC) and the Department of Justice both have jurisdiction to enforce the act, in practice the FTC is the only agency that exercises it. The FTC has brought few cases since the 1980s and last brought a case in 2000."). See William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 TEX. L. REV. 661, 662 n.6 (1982) (describing the Robinson-Patman Act as not a "true" antitrust law). Baxter was the Assistant Attorney General for Antitrust in the Reagan administration while I was Director of the Bureau of Competition, the antitrust enforcement arm of the Federal Trade Commission.

92. 15 U.S.C. § 13 (2012).

93. Baxter, *supra* note 91, at 682, 690-91. Not every price discrimination has an effect on the market, in which case a private party denied the benefit of a lower price would not be able to sue. See generally *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981) (holding a violation of the Robinson-Patman Act to be insufficient to state a claim without a showing of actual antitrust injury and damages).

94. 8 U.S.C. § 1151 (2012).

95. See Mayorkas, *supra* note 5; *Executive Actions on Immigration*, *supra* note 5.

96. See Mayorkas, *supra* note 5; *Executive Actions on Immigration*, *supra* note 5.

97. There is ambiguity in the statutory scheme. The deportation provisions of the statute require a specific order for each individual to be deported, signed by the Attorney General. 8 U.S.C. § 1227(a) (2012) ("Any alien . . . in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or

deport those not included in Congress' categories was a violation of his duty to "take Care that the Laws be faithfully executed."<sup>98</sup> The Solicitor General claimed<sup>99</sup> that President Obama's deferred action orders were no different in kind from President George W. Bush's decision to allow foreign students whose studies were interrupted by Hurricane Katrina to stay an extra semester,<sup>100</sup> or the decision by President Obama to grant temporary protected status to citizens of countries where Ebola made it unsafe for them to return.<sup>101</sup>

The distinction between these examples illustrates the fundamental point at issue. In deciding specific nonenforcement out of compassion for victims of a natural disaster, or for those for whom return would pose especially high health risks, President Bush and President Obama were not making decisions that undermined the immigration structure established by Congress. However, President Obama's decision to treat certain categories specified by Congress as nonexclusive to allow lawful residence may well have frustrated the immigration structure. An established maxim of statutory interpretation is that to express one case is to exclude others.<sup>102</sup> It

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more of the following classes of deportable aliens . . ."). This statutory language strongly suggests that an individualized determination had to be made within the executive branch, even for those who did not fall within the categories specifying whom Congress wanted to stay. As pointed out above in the context of the state exchanges under President Obama's health insurance law, it would have been quite helpful for Congress to have inserted into the immigration statute that the categories it created for individuals to stay in America lawfully were intended to be exclusive.

98. U.S. CONST. art. II, § 3, cl. 4; *Texas v. United States*, 787 F.3d 733, 746 (5th Cir. 2015), *aff'd on other grounds*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (mem.).

99. See Brief for Petitioner at 48–50, *United States v. Texas*, 136 S. Ct. 906 (2016) (No. 15-674).

100. Press Release, U.S. Citizenship & Immigration Servs., USCIS Announces Interim Relief for Foreign Students Adversely Impacted by Hurricane Katrina (Nov. 25, 2005), [http://www.uscis.gov/sites/default/files/files/pressrelease/F1Student\\_11\\_25\\_05\\_PR.pdf](http://www.uscis.gov/sites/default/files/files/pressrelease/F1Student_11_25_05_PR.pdf) [<https://perma.cc/Q4F5-R7K7>].

101. *Temporary Protected Status*, U.S. CITIZENSHIP AND IMMIGR. SERVS (Oct. 26, 2016), <https://www.uscis.gov/humanitarian/temporary-protected-status> [<https://perma.cc/SJ2K-AJXE>] (stating that "[t]he Secretary of Homeland Security may designate a foreign country for TPS due to conditions in the country that temporarily prevent the country's nationals from returning safely, or in certain circumstances, where the country is unable to handle the return of its nationals adequately"). A recent example is Guinea, added because of the Ebola epidemic. Designation of Guinea for Temporary Protected Status, 79 Fed. Reg. 69,511, 69,511 (Nov. 21, 2014).

102. 2A Sutherland Statutory Construction § 47:23, at 406 (Norman J. Singer & Shambie Singer, eds., 7th ed. 2014). See also Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 351 (2010) (explaining that "[e]xpressio unius stands for the common sense language rule that the expression of one thing suggests the exclusion of another thing").

would be difficult to infer that, having specified with great care all the criteria for lawful admission, Congress' will was not subverted by a President's determination that he could allow others to stay in the United States who entered it unlawfully, and did not meet the specified criteria.<sup>103</sup> Indeed, President Obama appeared to believe so himself, at least throughout his first term.<sup>104</sup>

For a court to require the executive to justify its failure to act is not unprecedented. Indeed, courts do so whenever an executive agency's action is challenged as discriminatory under the Administrative Procedure Act.<sup>105</sup> Discrimination in enforcement would be subject to correction by the reviewing court if it were found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>106</sup>

Discrimination has two components: enforcing the law against one group and not enforcing it against another. The executive can defend against such a claim by identifying a reason for both. Taken alone, an administrative agency's decision not to take an enforcement action has, since *Heckler v. Chaney*,<sup>107</sup> been held to be

103. See Delahunty & Yoo, *supra* note 1, at 853–54.

104. See *United States v. Juarez-Escobar*, 25 F. Supp. 3d 774, 783 (W.D. Pa. 2014); *Remarks by the President at Univision Town Hall*, White House (Mar. 28, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/03/28/remarks-president-univision-town-hall> [<https://perma.cc/ZD9U-KFS3>] (declaring that "[w]ith respect to the notion that I can just suspend deportations through executive order, that's just not the case, because there are laws on the books that Congress has passed. . . . There are enough laws on the books by Congress that are very clear in terms of how we have to enforce our immigration system that for me to simply through executive order ignore those congressional mandates would not conform with my appropriate role as President"). When President Obama announced his decision to act unilaterally, despite the immediately foregoing statement, he explained that he was doing so in the face of an intransigent Congress, and that he would have preferred to solve the problem legislatively. See *Remarks by the President in Address to the Nation on Immigration*, White House (Nov. 20, 2014), <https://obamawhitehouse.archives.gov/issues/immigration/immigration-action> [<https://perma.cc/KB9X-TLK5>].

105. 5 U.S.C. § 500 (2012).

106. *Id.* § 706 (2012). Indeed the statute explicitly grants review when an agency withholds an action. *Id.* ("The reviewing court shall—(1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; [or] (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . ."). The Administrative Procedure Act provides the standard for interested parties to challenge action by federal departments and agencies; it is the most common vehicle for attempting to overturn agency rule-making and adjudication in individual cases. See II ADMINISTRATIVE LAW TREATISE § 11.4, at 1018–22 (Richard J. Pierce, Jr. ed., 5th ed. 2010).

107. 470 U.S. 821 (1985).

nonreviewable.<sup>108</sup> A claim of discrimination, however, remains cognizable and adjudicating any such claim necessarily involves a court's consideration of the agency's decision not to act in one case while acting in another.<sup>109</sup>

Suppose it was statistically proven that the Food and Drug Administration ("the FDA") cracked down on the sale of drugs not authorized by the FDA predominantly where the pharmacist was of a minority race. The FDA could defend on the basis that some other factor was at work—for example, that fewer complaints were received of illegal drug use in majority race neighborhoods, which tended to have majority race pharmacists. In making that explanation, the FDA would be defending its decision *not* to enforce the law, in the case of white pharmacists, on the basis of complaints, not race.

Consider next the case where the FDA enforced the registration requirement for the sale of pharmaceuticals only in states that promised to provide the FDA substantial inspection and enforcement assistance. The pharmacist against whom the FDA seeks enforcement action could argue the FDA's decision was arbitrary and capricious, and "not in accordance with law," since obtaining assistance from state agencies was nowhere in the scheme of the FDA action.<sup>110</sup> The basis for the difference in treatment was thus *ultra vires*. The FDA would defend, successfully, by claiming it was exercising a degree of judgment that was contemplated in administrative law and not undermining of the scheme of the FDA statute.<sup>111</sup>

Finally, consider the case where the FDA fails to enforce the drug registration requirement anywhere. Assuming there is a party with standing, the premise for the challenge and the defense by the FDA would be the same as in the first two instances. There either was or was not a basis for the FDA's choosing not to proceed. If not, FDA's inaction would be arbitrary and capricious. If there was a basis, the question would turn to whether that basis was contemplated by the statute, or undermined the statute.<sup>112</sup> In the latter case, the FDA's action would be deemed not in accordance with law.

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108. *Id.* at 831 (holding it was not an abuse of discretion for the U.S. Food and Drug Administration to refuse to interfere with the use of lethal drugs in carrying out the death penalty).

109. See III ADMINISTRATIVE LAW TREATISE, § 17.5, at 1587–88 (Richard J. Pierce, Jr. ed., 5th ed. 2010).

110. 5 U.S.C. § 706(2)(A) (2012).

111. See III ADMINISTRATIVE LAW TREATISE, *supra* note 109, § 17.1, at 1559–60.

112. 5 U.S.C. § 706 (2012) ("The reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law.").



Administrative law, therefore, already contains all the elements required to evaluate a challenge to executive nonaction.<sup>113</sup> The difference between administrative law cases evaluating agency enforcement practices under an “arbitrary and capricious” standard and the broader cases of executive nonenforcement is not that it is difficult or novel to compel the executive to explain its nonaction. Rather, it comes down to whether a court can expect to order meaningful relief, and whether a plaintiff with standing exists.<sup>114</sup>

#### IV. REMEDIES

Thus, a court does have the means to identify unlawful executive action and nonaction. But, can a court order a meaningful remedy?

Where the President acts in an area reserved to the exclusive authority of Congress, the remedy is for a court to invalidate the President’s action, leaving Congress a free rein.<sup>115</sup>

Where the President has failed to act, however, the question of remedy is more complicated. Sometimes the deficiency is specifically identified, as in the Environmental Protection Agency (“the EPA”) grant to New York City that President Nixon impounded,<sup>116</sup> and then the party that would benefit from the President enforcing the law can obtain an order that the executive do so. Where the President’s reluctance to enforce a law does not have such an identifiably harmed private party, however, the question arises whether Congress can itself take steps to force the President to start enforcing the law. In the Sections that follow will discuss what remedies might be available

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113. Another example of the courts already making the kind of decisions required to analyze executive nonaction is the doctrine of severability. Under this doctrine of constitutional law, courts have had to decide whether a part of a law, held to be unconstitutional, was essential to the congressional intent in passing the law. *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987). *See generally* Tom Campbell, *Severability of Statutes*, 62 HASTINGS L.J. 1495 (2011) (arguing that the severability process should be entirely abolished because severability creates law that the legislature never intended). The same kind of analysis is required to conclude whether a President’s failure to enforce part of a law undermines congressional intent.

114. Love and Garg argue against the likelihood or efficacy of judicial review of agency inaction, for reasons of justiciability, among others. *See Love & Garg, supra* note 1, at 1227–29.

115. Likewise, in the instance of Congress acting in an area of inherent exclusive executive authority, the remedy is straightforward: a court can rule the congressional action (a statute) unconstitutional, and the executive proceeds unimpeded. *See, e.g., Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2096 (2015).

116. *Train v. City of New York*, 420 U.S. 35, 40. The Court held that the EPA had no discretion to refuse to allocate the full amount appropriated by Congress for specific water pollution control projects, even though the President had ordered funds impounded due to the budget deficit. *Id.* at 44–48.

to Congress, whether they would be practical, and whether current jurisprudence would grant Congress standing to pursue such relief.

A. *Nonjudicial Remedies*

Congress has many tools available to put pressure on the President.<sup>117</sup> For example, disagreeing with the President's failure to spend money as they wish, members of subcommittees of the Appropriations Committees in both the House and the Senate can threaten to withhold appropriations in particular areas in subsequent years, which may cause the executive branch to accommodate. In my personal experience, report language in appropriations bills, even though not part of the legislative enactment,<sup>118</sup> constitute memorials of such understandings. Other weapons in a war between the branches over the President's failure to take action include a Senate hold on the confirmation of a Presidential appointee, often, but not necessarily, in the same field as the challenged presidential nonaction.<sup>119</sup>

These political weapons should not be the only means at Congress' disposal to vindicate its legitimate right to see its laws enforced, nor should they be the preferred means in every case. The political weapons could be too strong. The ultimate threat Congress has is to shut down funding for the federal government, but that escalates what might have been a limited area of disagreement with the President into a massive consequence affecting the entire nation. Further, not every dispute between the President and Congress is political in nature; a good faith dispute over constitutional authority ought not be resolved by the balance of brute political force that might exist between a President and a Congress at any particular time. Therefore, redress of a dispute between the political branches through the nonpolitical third branch could be very beneficial.<sup>120</sup>

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117. Christenson and Kriner make this the focus of their article, explaining that the failure of Presidents to take more unilateral action is due to the threat of informal retaliation from Congress, and the public. *See* Christenson & Kriner, *supra* note 2, at 908.

118. WILLIAM N. ESKRIDGE JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 67 (4th ed. 2007).

119. President Clinton refused to bring reverse discrimination cases in areas of race-conscious action by government that his administration considered benign. In response, the Senate, controlled by the Republicans during the last six years of his presidency, refused to confirm his designee as Assistant Attorney General for Civil Rights. *See* Christopher Marquis, *Clinton Sidesteps Senate to Fill Civil Rights Enforcement Job*, N.Y. TIMES, Aug. 4, 2000, at A14; *Clinton Makes Lee Acting Civil Rights Chief*, CNN (Dec. 15, 1997), <http://www.cnn.com/ALLPOLITICS/1997/12/15/lee/> [<https://perma.cc/KDT6-YKYA>].

120. *See* TOM CAMPBELL, *SEPARATION OF POWERS IN PRACTICE* 193–97 (2004).

### B. *Injunctive Remedies*

The Supreme Court has held that a decision by the executive branch not to enforce a law is presumptively unreviewable by a court.<sup>121</sup> Practical considerations underlie that conclusion. A plaintiff has to show that the remedy a court is able to order is likely to ameliorate the plaintiff's concrete injury.<sup>122</sup> It is difficult, however, to craft an injunction that a court would use to grant relief in a case of nonaction. For instance, President Obama chose not to deport classes of individuals not legally present in the United States.<sup>123</sup> If a court had ordered him to do so, how many deportations would have sufficed? He also ordered the Department of Justice not to indict individuals for marijuana possession in states that have legalized private possession.<sup>124</sup> If ordered to abandon that policy, would President Obama have shown sufficient compliance by bringing ten such cases a year?<sup>125</sup>

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121. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (holding that “[r]efusals to take enforcement steps generally involve precisely the opposite situation, and in that situation we think the presumption is that judicial review is not available”). This is the case despite the APA’s empowerment of federal courts to “compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1) (2012). Hence, this Article concludes that the *Heckler* court treated the APA as though it had an additional phrase at the end of Section 706(1), as if it read “where the court can accomplish such a result.”

122. The Supreme Court has held

on several occasions over many years that an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion. This recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement.

*Heckler*, 470 U.S. at 831 (citations omitted). “[I]t must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 43 (1976)). See also *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) (citing *Lujan*, 504 U.S. at 560–61) (holding that “[t]o ensure the proper adversarial presentation, *Lujan* holds that a litigant must demonstrate that . . . it is likely that a favorable decision will redress that injury.”).

123. See Mayorkas, *supra* note 5; *Executive Actions on Immigration*, *supra* note 5.

124. See Memorandum from James M. Cole, *supra* note 7.

125. Professor Stern has noted that

[i]t is difficult to envision a ruling that would ensure that the Executive enforced a law in a manner satisfactory to congressional plaintiffs. Precise metrics do not exist for assessing the adequacy of such efforts, and the Court might well rear back from issuing a potentially messy, if not futile, decree. The judiciary’s lack of competence to supervise military training was a significant factor in the Court’s holding that a suit seeking such relief presented a political question. Similar considerations of manageability could inform its ruling on legislator standing to force the Executive to do its job.

When the Supreme Court has overruled a President's nonaction, it has been in the context of a very specific circumstance, such as an EPA project for which Congress appropriated money for New York City that President Nixon nevertheless failed to fund.<sup>126</sup> No general order to fund environmental projects was requested; New York City had a specific project on the list of EPA-approved beneficiaries, and all the Court had to do was unfreeze the money.<sup>127</sup> Similarly, in *Dunlop v. Bachowski*,<sup>128</sup> the Court felt it appropriate to order the Secretary of Labor to undertake an investigation of a kind specifically authorized in the governing statute when details of an individual case were presented to the Secretary.<sup>129</sup> When the EPA refused to

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Stern, *supra* note 1, at 44–45 (footnote omitted).

126. *Train v. City of New York*, 420 U.S. 35, 47 (1975).

127. While the Court in *Massachusetts v. EPA*, 549 U.S. 497 (2007), did order the EPA to make a finding regarding greenhouse gas emissions from automobiles, it did not have before it the adequacy of what the EPA did upon making such a finding, *id.* at 534–35. A change in Presidential administrations mooted the difficulty the Court would have had in determining how much EPA activity would constitute compliance with the Court's holding that nonaction was unacceptable. *Cf.* Love & Garg, *supra* note 1, at 1227 (crediting the widespread publicity of greenhouse gas regulation as the reason why the Court decided to step in, and recognizing that many other “low-salience instances of executive inaction” never receive their day in court).

128. 421 U.S. 560 (1975).

129. *Id.* at 573. In *Heckler v. Chaney*, the Court explained this as a departure from the usual rule of deferring to the executive branch's discretion:

*Dunlop v. Bachowski*, relied upon heavily by respondents and the majority in the Court of Appeals, presents an example of statutory language which supplied sufficient standards to rebut the presumption of unreviewability. *Dunlop* involved a suit by a union employee, under the Labor-Management Reporting and Disclosure Act (LMRDA), asking the Secretary of Labor to investigate and file suit to set aside a union election. Section 482 provided that, upon filing of a complaint by a union member, “[t]he Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation . . . has occurred . . . he shall . . . bring a civil action . . .” After investigating the plaintiff's claims the Secretary of Labor declined to file suit, and the plaintiff sought judicial review under the APA. This Court held that review was available. It rejected the Secretary's argument that the statute precluded judicial review, and in a footnote it stated its agreement with the conclusion of the Court of Appeals that the decision was not “an unreviewable exercise of prosecutorial discretion.” Our textual references to the “strong presumption” of reviewability in *Dunlop* were addressed only to the § (a)(1) exception; we were content to rely on the Court of Appeals' opinion to hold that the § (a)(2) exception did not apply. The Court of Appeals, in turn, had found the “principle of absolute prosecutorial discretion” inapplicable, because the language of the LMRDA indicated that the Secretary was required to file suit if certain “clearly defined” factors were present. The decision therefore was not “beyond the judicial capacity to supervise.”

*Heckler v. Chaney*, 470 U.S. 821, 833–34 (1985) (citations omitted). *See also* Sant'Ambrogio, *supra* note 86, at 395 (citing *Adams v. Richardson*, 480 F.2d 1159, 1162

promulgate rules on greenhouse gas emissions, the Court was also willing to order executive action: namely, that the EPA commence administrative rulemaking on that subject. The Court intimated, however, that it would likely not order any specific enforcement action if the EPA did not wish to bring a case against any given greenhouse gas emitter.<sup>130</sup>

The Court has also allowed review of executive nonenforcement of law where the heart of the challenge to executive nonaction is discriminatory treatment.<sup>131</sup> One way by which this occurs is where the executive enforces a law against some but not others if the first entity can claim the difference in treatment is due to a basis that would violate the Fifth or Fourteenth Amendments.<sup>132</sup> In such a case, a court can craft a remedy by simply ordering the action against the first entity to cease.<sup>133</sup>

For example, if the President ordered that no income tax evasion cases be brought against white taxpayers, a black taxpayer would have standing to challenge a tax evasion action against her. This would be an indirect remedy, since the court would not actually order

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(D.C. Cir. 1973) (en banc)) (discussing the *Chaney* Court's treatment of *Bachowski* and the lower court opinion ordering executive action in *Adams*).

130. The Supreme Court also stated that

[s]ome debate remains, however, as to the rigor with which we review an agency's denial of a petition for rulemaking. There are key differences between a denial of a petition for rulemaking and an agency's decision not to initiate an enforcement action. In contrast to nonenforcement decisions, agency refusals to initiate rulemaking "are less frequent, more apt to involve legal as opposed to factual analysis, and subject to special formalities, including a public explanation." They moreover arise out of denials of petitions for rulemaking which (at least in the circumstances here) the affected party had an undoubted procedural right to file in the first instance. Refusals to promulgate rules are thus susceptible to judicial review, though such review is "extremely limited" and "highly deferential."

*Massachusetts v. EPA*, 549 U.S. at 527–28 (citations omitted) (overruling EPA's decision not to regulate greenhouse gas emissions). See Sant'Ambrogio, *supra* note 86, at 397.

131. See *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886); cf. *Heckler*, 470 U.S. at 838 ("No colorable claim is made in this case that the agency's refusal to institute proceedings violated any constitutional rights of respondents, and we do not address the issue that would be raised in such a case.").

132. Discriminatory enforcement by the federal executive would violate the Fifth Amendment's requirement that no person be "deprived of life, liberty, or property without due process of law." U.S. CONST. amend V. State executive action of that kind would violate the Fourteenth Amendment's prohibition against denying any person the "equal protection of the laws." U.S. CONST. amend. XIV. Such discrimination could be litigated under the judicial review provision of the Administrative Procedure Act. See 5 U.S.C. § 702 (2012); 28 U.S.C. § 1983 (2012).

133. This is what occurred as a result of the Supreme Court's remand in *Yick Wo*. See *Yick Wo*, 118 U.S. at 374.

the President to enforce the law against white taxpayers. The action the court can take only indirectly puts pressure on the executive branch. The heart of the complaint is that the President has used a statute in an unconstitutional way, and the remedy is to end the discrimination by stopping prosecutions, not by ordering them.<sup>134</sup>

Beyond the exceptions noted, however, it is generally difficult to see how a court could effectively draft an order to compel enforcement of a law in the face of the executive's wholesale policy decision not to do so.<sup>135</sup>

### C. Declaratory Judgment Relief

To overcome the practical obstacle of crafting a decree where the President has taken no action, congressional plaintiffs might ask a federal court simply to issue a declaratory judgment,<sup>136</sup> that the President or an executive agency under the President's direction, had violated the Administrative Procedure Act by failing to act.<sup>137</sup>

134. Such an approach has storied antecedent in the law of remedies. When a singer violated her contract to perform, the impresario could not obtain an injunction compelling her to sing, but could prevent her from singing in another music hall. *Lumley v. Wagner* (1852) 42 Eng. Rep. 687, 687, 1 DeG., M & G. 604, 604.

135. Where the relief requested is very specific, a court can fashion an order that will result in compliance. *See, e.g., Train v. City of New York*, 420 U.S. 35, 37–40 (1975). That was the situation in *Train v. City of New York*, where the federal grant to New York City was ready to be issued, but was held up by the President's order. *Id.* Unlocking that order was all that was needed for New York City to obtain relief. *See id.* at 40. In any case involving more complex action, however, a court would be involved in an impossible task of monitoring the executive's compliance. *Lumley v. Wagner* is once again instructive: the court could not order an opera singer to sing as required by her contract with the music hall, since she might intentionally perform poorly. *Lumley*, 42 Eng. Rep. at 687, 1 DeG., M & G. at 604. That is why the English court ordered the equitable relief not of ordering her to sing, but of preventing her from singing elsewhere. *Id.*

136. *See* Federal Declaratory Judgment Act, 28 U.S.C. § 2201(a) (2012) (“In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.”)

137. A purely advisory opinion is not permitted to federal courts because of the federal judiciary's restriction to “cases and controversies,” U.S. CONST. art III, § 2. What keeps a declaratory judgment from being considered such an advisory opinion is the presence of specific parties, with a specific dispute against each other. In *MedImmune, Inc. v. Genentech, Inc.*, the Court explained the difference by stating that

[t]here was a time when this Court harbored doubts about the compatibility of declaratory-judgment actions with Article III's case-or-controversy requirement. . . . We dispelled those doubts, however, in *Nashville, C. & St. L. R. Co. v. Wallace*, holding (in a case involving a declaratory judgment rendered in state court) that an appropriate action for declaratory relief *can* be a case or

Alternatively, a complaint might be permitted that the President had failed to “take Care that the Laws be faithfully executed.”<sup>138</sup> Would such a declaration constitute sufficient redress of the plaintiffs’ injury as to satisfy Article III’s requirement of a case or controversy?

The answer should be yes, where the executive branch has made clear its intention not to enforce the law.<sup>139</sup> By way of illustration, suppose a President fails to take some action on the grounds that taking such action would be unconstitutional.<sup>140</sup> A declaratory judgment could be sought by the Congress that the President enforcing the law would, in fact, not be unconstitutional—so long as the context was in a specific circumstance of a Presidential failure to act, the “case or controversy” requirement of Article III, section 2,

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controversy under Article III. The federal Declaratory Judgment Act was signed into law the following year, and we upheld its constitutionality in *Aetna Life Ins. Co. v. Haworth*. . . . *Aetna* and the cases following it do not draw the brightest of lines between those declaratory-judgment actions that satisfy the case-or-controversy requirement and those that do not. Our decisions have required that the dispute be “definite and concrete, touching the legal relations of parties having adverse legal interests”; and that it be “real and substantial” and “admi[t] of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.” In *Maryland Casualty Co. v. Pacific Coal & Oil Co.* we summarized as follows: “Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.”

549 U.S. 118, 126–127 (2007) (citations omitted).

138. U.S. CONST. art. II, § 3. The Supreme Court ordered briefing on this issue in the case challenging President Obama’s failure to deport categories of individuals deportable under the law: the “[p]etition for a writ of certiorari is granted. In addition to the questions presented by the petition, the parties are directed to brief and argue the following question: ‘Whether the Guidance violates the Take Care Clause of the Constitution, Art. II, § 3.’” *United States v. Texas*, 136 S. Ct. 906, 906 (2016) (mem.) (referring to the Deferred Action for Parents of Americans “guidance” under which a class of parents of children born in America not otherwise legally present would receive an assurance they would not be deported). The Court subsequently issued a per curiam opinion affirming the judgment by an equally divided court. *United States v. Texas*, 136 S. Ct. 2271, 2271–72 (2016) (mem.).

139. Love and Garg correctly observe that it would be very difficult to distinguish inaction from slow action, or just tacit nonenforcement. Love & Garg, *supra* note 1, at 1228. As Price makes clear, however, it is the flagrant, announced instances of nonenforcement that do the most damage to the Constitution’s separation of powers. Price, *supra* note 21, at 1138. *But cf.* Sant’Ambrogio, *supra* note 86, at 357 (arguing transparency of nonenforcement policy is a virtue). So if we allow declaratory relief in that subset of cases where the executive has been explicit (which comprises most of the recent instances of executive nonaction that have given rise to complaint—in the areas of immigration, and marijuana, for instance), we will have accomplished much.

140. See Delahunty & Yoo, *supra* note 1, at 836.

would be met.<sup>141</sup> Once that issue was resolved at the level of the U.S. Supreme Court, if the President persisted in failing to perform the requested action, such an attitude would more clearly approach dereliction of duty than if there had not been such a court ruling.<sup>142</sup> The Court's role would be to say whether or not the law was constitutional, a function squarely within the judicial role to "say what the law is."<sup>143</sup> Whether or not the President's failure to enforce a law would be grounds for an impeachment is the House of Representatives' prerogative.<sup>144</sup> The Court making a holding on

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141. To take an actual illustration, consider the facts in *INS v. Chadha*, 462 U.S. 919 (1983). Chadha, an alien who had illegally overstayed his visa, had nevertheless been allowed to stay in the United States by the Immigration and Naturalization Service. *Id.* at 923–24. However, pursuant to a law that gave each house of Congress the right to overturn a stay of deportation by the executive branch, the House of Representatives had ordered Mr. Chadha's deportation. *Id.* at 925–26. The Board of Immigration Appeals ruled it lacked jurisdiction to strike down the law that the House had utilized, so it ordered the deportation. *Id.* at 928. Mr. Chadha appealed the Board of Immigration Appeals' decision to the circuit court, which held unconstitutional the law under which the House had acted. *Id.* At that point, both sides (Mr. Chadha, and the Immigration and Naturalization Service, the parent agency of the Board of Immigration Appeals) were on the same side. The circuit court had afforded them both the relief they each sought: a stay of Mr. Chadha's deportation. *Id.* The INS wanted to appeal to the U.S. Supreme Court to obtain a definitive ruling that the law was unconstitutional. *Id.* at 928–29. Mr. Chadha was safe; what INS wanted was in essence a declaratory judgment that the statute was, indeed, unconstitutional. All other relief had been granted: Mr. Chadha's deportation had been suspended. *Id.* at 928. The Supreme Court entertained the appeal, claiming sufficient adversity existed to constitute a "case or controversy" by reason of the intervention at the appellate level by the House of Representatives—long after the rulings by the Immigration Judge, and the Bureau of Immigration Appeals, of which Mr. Chadha had complained. 462 U.S. at 939 & n.5. The logic of *INS v. Chadha*, therefore, supports the conclusion that a declaratory judgment action to rule some governmental action unconstitutional is sufficient to constitute a case or controversy, for Article III, section 2 purposes, so long as a specific set of facts and parties is before the court. U.S. CONST. art. III, § 2.

142. In *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000), the D.C. Circuit denied standing to members of Congress seeking declaratory judgment that President Clinton had violated the War Powers Act and the U.S. Constitution by his military actions in Kosovo. *Id.* at 24. In listing alternative remedies available to the House members, Judge Silberman said, "[T]here always remains the possibility of impeachment should a President act in disregard of Congress' authority on these matters." *Id.* at 23.

143. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

144. U.S. CONST. art. I, § 2, cl. 5. It is entirely permissible, even admirable, for a President to insist on his own view that a law is unconstitutional, even if the courts have held that it is constitutional. It remains with the House of Representatives to decide whether the President's insistence is pretextual, or worthy of respect even if different from the view of the courts. This framework has been described by noting that

[t]he Constitution establishes a belt, suspender, and rope approach to its defense, with Congress, the courts, the states, the people, and the President all having roles to play. Congress should consider the constitutionality of the bills it debates; the courts must do the same when presented with a claim of unconstitutionality; and



constitutionality, therefore, does not intrude into the authority of a co-equal branch, which would violate the political question doctrine.<sup>145</sup>

The President might change his approach of nonenforcement in the face of such a declaratory judgment. If failing to see enforcement of a law it passed constitutes cognizable “concrete and particularized injury” to the Congress—a point on which there is dispute<sup>146</sup>—then the likelihood that a declaratory judgment would lead the President to start enforcing the law would satisfy the justiciability requirements set out by the U.S. Supreme Court.<sup>147</sup>

#### D. *Qui Tam Actions*

Another possible judicial means of redress for the executive’s failure to enforce a law is in a *qui tam* action by a private party under the False Claims Act.<sup>148</sup> If an expenditure of money has occurred that is contrary to law, but the President has not enforced the law that would have prohibited that payment of money, a private party can

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the people must decide whether their agents have been faithful to the Constitution. The fact that the President has multiple means of defending the Constitution and thereby satisfying his oath is hardly surprising.

Devins & Prakash, *supra* note 1, at 537.

145. The Supreme Court has explained this, stating that

[r]esolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by courts because the issues have political implications in the sense urged by Congress. *Marbury v. Madison* was also a “political” case, involving as it did claims under a judicial commission alleged to have been duly signed by the President but not delivered. But “courts cannot reject as ‘no law suit’ a bona fide controversy as to whether some action denominated ‘political’ exceeds constitutional authority.”

*Chadha*, 462 U.S. at 943 (citations omitted).

146. See *infra* Section V.B.1–2. Three Supreme Court cases have come to different conclusions on legislators’ standing. *Coleman v. Miller*, 307 U.S. 433, 438 (1939), granted standing to state legislators whose votes were sufficient to stop a result, when the result was allowed to happen anyway. *Raines v. Byrd*, 521 U.S. 811 (1997), denied standing to a U.S. Senator who complained about the change in the legislative system wrought by a law giving the President the line-item veto. *Id.* at 815–18. *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015), granted standing to state legislators complaining that a citizens’ initiative had taken away their redistricting power. *Id.* at 2658–59. *Raines*, the case that denied standing, actually contained the most accommodating language to the claim that legislators who passed a law would have standing to sue when the law was not enforced; but that phrasing was not necessary to the holding of the case. See *Raines*, 521 U.S. at 815–17. But see *Goldwater v. Carter*, 617 F.2d 697, 701–02 (D.C. Cir. 1979) (en banc), *vacated*, 444 U.S. 996 (1979) (mem.).

147. *Massachusetts v. EPA*, 549 U.S. 497, 516–17 (2007).

148. 31 U.S.C. §§ 3729–33 (2012).

present a demand to the executive to do so.<sup>149</sup> When rebuffed, the private party can then proceed to court on his or her own to prove the illegal payment, keeping a portion of the eventual judgment as reward for having vindicated the public interest.<sup>150</sup> Not every instance of executive nonaction, of course, will involve a payment of money from the federal treasury. Where those circumstances are met, however, the law can be enforced by a “private attorney general” in a *qui tam* action.<sup>151</sup>

In a *qui tam* situation, an actual case or controversy exists because a fraud has occurred. The False Claims Act is violated because of the payment of money to someone not entitled to it.<sup>152</sup> The redress is the payment of three times the money owed to the government, and a fine,<sup>153</sup> as well as the kind of recovery available in civil litigation.<sup>154</sup> The executive’s failure to act is not technically cured; a *qui tam* court does not order the executive branch to enforce the law against other miscreants in the future. However, as in the case of the negative injunction discussed above, *qui tam* cases indirectly vindicate congressional desire to enforce the False Claims Act expansively when the President does not choose to enforce it.<sup>155</sup>

One illustration of a potentially successful action under the False Claims Act would be that of a *qui tam* action brought by a citizen complaining of a bill to be paid to a private contractor for the Department of Defense, transporting soldiers to fight in a war that was illegal either as a violation of the War Powers Resolution, or as because Congress did not declare war, as the U.S. Constitution requires.<sup>156</sup>

Drawing together the previous two Sections, I conclude that courts are capable of deciding when executive action or inaction is

149. *Id.* § 3730(b)(2).

150. *Id.* § 3730(d)(1)–(2).

151. *Cf.* *Cook Cty. v. United States ex rel Chandler*, 538 U.S. 119, 122 (2003). Despite the False Claims Act, the executive branch might stymie enforcement of some *qui tam* claims by failing to confiscate property in question, an issue on which there has not been recent jurisprudence. *See Price, supra* note 1, at 714–15, 721–22 (discussing the *Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1868)).

152. 31 U.S.C. § 3729 (2012).

153. *Id.*

154. *Id.* § 3730.

155. *Cook Cty.*, 538 U.S. at 129 (“Congress wrote expansively, meaning ‘to reach all types of fraud, without qualification, that might result in financial loss to the Government.’”) (citing *United States v. NeifertWhite Co.*, 390 U.S. 228, 232 (1968)).

156. The False Claims Act states that “any person who . . . knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval” violates the False Claims Act. 31 U.S.C. § 3729 (a)(1)(A). It further explains that “the terms ‘knowing’ and ‘knowingly’ . . . require no proof of specific intent to defraud.” *Id.* § 3729(b)(1)(B).

unlawful and of ordering meaningful relief that would likely alter executive behavior. However, federal courts can only act in an actual case or controversy and that requires finding a party with standing to bring the case to court. It is to that question that I now turn.

## V. STANDING

Either private individuals hurt by executive action, or the legislature that passed a law which the executive failed to enforce, might have standing to challenge the executive.

### A. *Individual, Nongovernment Parties*

Individual parties who have been harmed by executive action alleged to have infringed on the rights of Congress have standing to sue. Examples of such include a soldier ordered to go to war without a congressional declaration of war or resolution under the War Powers Act,<sup>157</sup> or conservative nonprofit public policy advocates whom the IRS subjected to more stringent review than other groups.<sup>158</sup> The remedy, if the executive action is illegal, is to cease the executive action.<sup>159</sup> Sometimes there will be individual parties who have been harmed by executive *inaction* of sufficient specificity that they can obtain relief: the child whose parents wanted “Jerusalem, Israel” on his passport,<sup>160</sup> or New York City, which had its EPA grant impounded by the Nixon administration.<sup>161</sup> There will be other cases, however, without individual parties with adequate standing to complain of executive inaction. In such circumstances, a judicial remedy can only be fashioned if legislators bring suit.

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157. *Campbell v. Clinton*, 52 F. Supp. 2d 34, 43 n.8 (D.D.C. 1999), *aff'd*, 203 F.3d 19 (D.C. Cir. 2000), *cert. denied*, 531 U.S. 815 (2000).

158. *See Freedom Path, Inc. v. Lerner*, No. 3:14-CV-1537-D, 2016 WL 3015392, at \*5 (N.D. Tex. May 25, 2016).

159. The archetypical case is *SEC v. Chenery Corporation*, 318 U.S. 80 (1943), wherein the Court sustained the appellate court’s decision to set aside the order of the SEC, an executive branch agency, at the request of the party aggrieved by the SEC’s order. *Id.* at 95.

160. *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1424–25 (2012).

161. *Train v. City of New York*, 420 U.S. 35, 47 (1975).

*B. Legislative Standing*

1. New Language in Future Statutes to Help Congress Establish Standing

Where members of Congress have sought a judicial remedy for presidential actions in recent years, the President has often won on the basis that the case is nonjusticiable because the Congressmembers lack standing.<sup>162</sup> Nonjusticiability has a constitutional basis in the requirement that the federal judicial power extends to “cases” and “controversies,” not hypothetical questions.<sup>163</sup> It also has a prudential component.<sup>164</sup> Congress can use its authority to set the jurisdiction of

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162. Some commentators have concluded that the challenges to congressional standing are insurmountable. *See, e.g.,* Delahunty & Yoo, *supra* note 1, at 786. These commentators base their opinions on a string of cases that give a basis for such a conclusion. *See generally* *Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999) (denying standing to congressmembers suing over President Clinton’s designation of environmentally protected rivers); *Kucinich v. Obama*, 821 F. Supp. 2d 110 (D.D.C., 2011) (denying standing to congressmembers suing over President Obama’s going to war in Libya); *Campbell*, 52 F. Supp. 2d 34 (denying standing to congressmembers suing over President Clinton’s going to war in Yugoslavia without Congressional approval). *But see* *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53, 77 (D.D.C. 2015) (granting standing to the House of Representatives challenging the Secretary of HHS’ subsidizing health insurers without an appropriation from Congress).

163. U.S. CONST. art. III, § 2. *See* *Muskrat v. United States*, 219 U.S. 346, 361–62. (1911).

164. This is described in the *Windsor* opinion, which states

[there is a] distinction between two principles: the jurisdictional requirements of Article III and the prudential limits on its exercise. The latter are “essentially matters of judicial self-governance.” The Court has kept these two strands separate: “Article III standing, which enforces the Constitution’s case-or-controversy requirement; and prudential standing, which embodies ‘judicially self-imposed limits on the exercise of federal jurisdiction[.]’ ”

*United States v. Windsor*, 133 S. Ct. 2675, 2685 (2013) (citations omitted). Lower courts have also written about this prudential element:

The most satisfactory means of translating our separation-of-powers concerns into principled decisionmaking is through a doctrine of circumscribed equitable discretion. . . . The standard would counsel the courts to refrain from hearing cases which represent the most obvious intrusion by the judiciary into the legislative arena: challenges concerning congressional action or inaction regarding legislation. Yet this standard would assure that non-frivolous claims of unconstitutional action which could only be brought by members of Congress will be reviewed on the merits. . . . We would welcome congressional plaintiff actions involving non-frivolous claims of unconstitutional action which, because they could not be brought by a private plaintiff and are not subject to legislative redress, would go unreviewed unless brought by a legislative plaintiff. In this last situation, there are no prudential considerations or separation-of-powers concerns which would outweigh the mandate of the federal courts to “say what the law is.”

federal courts<sup>165</sup> to overcome judicial resistance to hearing cases based on prudential, nonconstitutional, considerations by adding language like the following to any law it passes:

To enforce the provisions of this act, either house of Congress shall, upon passage of a resolution of that house, have standing to the maximum extent constitutionally permissible to pursue a declaratory judgment against the appropriate executive branch employee, department, or agency, and no court shall dismiss such action except on the grounds of unconstitutionality.<sup>166</sup>

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Riegle v. Fed. Open Mkt. Comm., 656 F.2d 873, 881–82 (D.C. Cir. 1981) (citation omitted).

165. U.S. CONST. art. III, § 2, cl. 2.

166. Judge McGowan advised that such congressional circumscription of a federal court's equitable discretion to refuse to hear a legislator's challenge would be within Congress' power:

The decision by Congress to remove a federal court's *discretion* to award a declaratory judgment should not raise any constitutional concerns. Even if Congress stipulates that the courts lack discretion in one particular subject area, the courts are still free to reject the claim on the merits. The freedom of the federal courts to reach a decision either way on the merits avoids the constitutional infirmities discussed in *United States v. Klein*. The power of Congress over a federal court's *equitable* discretion is a more murky question. It can be argued that such discretion is part of the 'judicial power' and therefore can be exercised only by the tribunal from which an equitable remedy is sought. On the other hand, if it is constitutional for Congress to withdraw a federal court's equitable powers, the relatively less-intrusive act of *requiring* courts to grant an equitable remedy to a prevailing party might seem part of Congress's power over the lower federal courts granted by Article I, section 8 of the Constitution.

Carl McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241, 264–65 nn.89–90 (1981) (citations omitted).

Professor Harrison, by contrast, argues that enacting such a law would be beyond Congress' authority, as it would interfere with the executive branch's duty to enforce the law. John Harrison, *Legislative Power, Executive Duty, and Legislative Lawsuits*, 31 J.L. & POL. 103, 115 (2015).

Judge McGowan has the better side of the argument; Professor Harrison proves too much when he claims giving Congress the right to sue results in impermissible supervision of the executive. *Id.* at 116 ("Requiring that officers perform their legal duties is a form of supervision."). I agree, but the supervision is by the court, not by the plaintiff. A private party, with standing, all would concede, suing the executive to perform a function beneficial to that party does not supervise the executive, but asks a court to supervise the executive. The same is true in a lawsuit by the Congress. It would be asking the judicial branch to supervise the executive branch insofar as the executive branch has failed in a statutory or constitutional duty. *United States v. Nixon*, 418 U.S. 683, 696–97 (1974). See also Jonathan Remy Nash, *A Functional Theory of Congressional Standing*, 114 MICH. L. REV. 339, 346 n.36 (2015) ("Unlike Article III standing, prudential standing is not grounded in the Constitution; doctrines of prudential standing are generated by the courts, and Congress remains free to revise and override them.") (citing *Warth v. Seldin*, 422 U.S. 490, 500–01 (1975)); cf. James A. Turner, Comment, *The Post-Medellín Case for*

While Congress cannot create a justiciable case where there is no specific harm or party aggrieved, the Court has recently spoken deferentially of Congress' special ability to identify harm that a court might not otherwise have found. In ruling that an individual could have standing to sue a credit reporting agency for an error in its report about him, the Court explicitly showed deference to Congress' judgment in the Fair Credit Reporting Act<sup>167</sup> that intangible harms were cognizable.<sup>168</sup> Further, the court explained

[i]n addition, because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important. Thus, we said in *Lujan* that Congress may “elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.” Similarly, Justice Kennedy’s concurrence in that case explained that “Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.”<sup>169</sup>

Thus, if Congress were to add the language this Article suggests to future legislation, it should substantially advance its claim to standing to sue for the intangible harm of executive nonaction.

## 2. Supreme Court Precedent for Legislators’ Standing

The modern starting point for Supreme Court holdings on legislators’ standing is *Coleman v. Miller*.<sup>170</sup> *Coleman* granted standing to a majority of Kansas state senators to challenge the effect of the lieutenant governor’s vote to break a tie in the Kansas Senate, which resulted in the ratification by Kansas of an amendment to the U.S. Constitution to allow Congress to prohibit child labor.<sup>171</sup> In 2015, in *Arizona State Legislature v. Arizona Independent Redistricting*

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*Legislative Standing*, 59 AM. U. L. REV. 731, 747–48 (2010) (collecting authorities on both sides).

167. 15 U.S.C. § 1681 (2012).

168. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016).

169. *Id.* *But see id.* at 1547–48 (“Injury in fact is a constitutional requirement, and ‘[i]t is settled that Congress cannot erase Article III’s standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.’”) (citations omitted).

170. 307 U.S. 433 (1939).

171. *Id.* at 446. The amendment was proposed in light of the U.S. Supreme Court’s ruling that Congress lacked authority to ban child labor. *Hammer v. Dagenhart*, 247 U.S. 251, 276–77 (1918) *overturned by* *United States v. Darby*, 312 U.S. 100 (1941). The amendment was never adopted, as *Darby* rendered it unnecessary. *Darby*, 312 U.S. 116–17.

*Commission*,<sup>172</sup> the Court affirmed its holding in *Coleman*. *Arizona Independent Redistricting Commission* granted standing to the Arizona State Legislature as an institution to challenge the creation of an independent commission to perform the redistricting function that the legislature believed was reserved for them under the U.S. Constitution:

*Coleman*, as we later explained in *Raines*, stood “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.”<sup>173</sup>

Under this formulation, the legislative branch would have standing to sue when the executive branch fails to enforce a law, in other words, when “legislative action . . . does not go into effect.”<sup>174</sup> The *Raines* Court’s phrasing of the test, quoted in *Arizona Independent Redistricting Commission*, was, however, broader than the facts of the case in *Coleman*, where the action of the state senate prevented a result that was implemented anyway.<sup>175</sup> What is of interest for the purposes of this Article is the converse: where action the legislative branch desires is not taken by the executive. The quote from *Raines*, repromulgated in *Arizona Independent Redistricting Commission*, is *obiter dicta* as to the instance of executive nonaction.

Further, while the test announced in *Raines* holds legislators’ interests in seeing their laws enforced to be sufficient, the decision itself was against legislative standing, as will be discussed below. There has not been a Supreme Court decision on the question of legislative standing in the context of executive inaction. Is it safe, therefore, to rely on the *Raines*’ rephrasing of *Coleman* that holds legislators’ interests in seeing their laws enforced to be adequate for standing?

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172. 135 S. Ct. 2652 (2015).

173. *Id.* at 2665.

174. *See* *Raines v. Byrd*, 521 U.S. 811, 823 (1997).

175. *Coleman*, 307 U.S. at 446. *See* *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53, 77 (D.D.C. 2015) (granting standing to the House of Representatives challenging the Secretary of the Department of Health and Human Services’ (“HHS”) subsidizing health insurers without an appropriation from Congress). *Burwell*, like *Coleman*, presents facts where action took place contrary to what the legislative branch had wished, not where the complaint was over executive nonaction. *Coleman*, 307 U.S. at 438; *Burwell*, 130 F. Supp. 3d at 57–66.

The conclusion I reach below is that *Coleman* remains good law; but, since it is not controlling precedent, it would be wise for Congress to identify a more particularized harm than simply wanting to see its laws enforced to enhance the prospect of congressional standing when challenging executive inaction.

### 3. *Raines* Decision Does Not Vitiating *Coleman*

*Coleman* was distinguished in *Raines v. Byrd*.<sup>176</sup> In *Raines*, Congress had passed a law giving the President line-item veto authority over budgets.<sup>177</sup> Senator Robert Byrd had voted against the law; and when it passed, he sued claiming the line-item veto had undercut his authority as a senator.<sup>178</sup> The Supreme Court denied standing to Senator Byrd.<sup>179</sup> In *Arizona Independent Redistricting Commission*, *Raines* was explicitly preserved.<sup>180</sup>

There are several points of distinction between *Coleman* and *Raines*. In *Arizona Independent Redistricting Commission*, the Court noted prominently one key distinction: the plaintiffs in *Coleman* constituted a majority of the legislative branch whose rights were being asserted,<sup>181</sup> in *Raines*, the plaintiffs were only six individual members of Congress.<sup>182</sup> Hence, where Congress as an institution<sup>183</sup>

176. *Raines*, 521 U.S. at 821–22.

177. *Id.* at 814.

178. *Id.* at 816.

179. *Id.* at 830.

180. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2658, 2665 (2015).

181. *Coleman v. Miller*, 307 U.S. 433, 435–36 (1939)

182. *Raines*, 521 U.S. at 814. The small number of members of Congress suing was significant to the holding of the case:

[A] dispositive factor in the D.C. Circuit's standing analysis, and subsequently *Arizona State Legislature's* analysis, centers around the number of members that sued. The D.C. Circuit rejected legislator standing because the members suing did not constitute a majority. But instances in which a majority of Senate or House members sue over presidential non-enforcement seemingly would satisfy the D.C. Circuit and the *Arizona State Legislature's* standing threshold.

Bethany R. Pickett, Note, *Will the Real Lawmakers Please Stand Up: Congressional Standing in Instances of Presidential Nonenforcement*, 110 NW. U. L. REV. 439, 467 (2016) (footnotes omitted).

183. *Raines*, 521 U.S. at 829 (stating that “[w]e attach some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose their suit”). In *Burwell*, the district court judge put emphasis on the fact that the House had authorized the lawsuit; it was not brought simply by individual members. *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53, 67 (D.D.C. 2015). That it was the House alone rather than Congress was identified as a possible issue, but not an impediment, in the court's opinion. If my theory is accepted that the House would have standing to seek a declaratory judgment regarding



seeks a declaratory judgment that the President has failed to enforce a law, all the standing requirements would be met.<sup>184</sup>

Another point of distinction between *Coleman* and *Raines* is that, as the Court saw *Raines*, Senator Byrd *lost* a legislative vote, and went to court to try to have another chance.<sup>185</sup> By contrast, any action

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the President's action or nonaction, because of the House's constitutional role in impeachment, see discussion *infra* Section V.B.4, a resolution of the House alone should be sufficient. There are other, limited, instances where prerogatives of the legislative branch are enjoyed by less than a full majority of both houses, and in those instances, standing should be available to the number of House or Senate members requisite to the power being asserted. In *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir. 1978), *vacated*, 444 U.S. 996 (1979), for instance, one-third plus one of the senators should have been granted standing, since the premise of the action was that the power of one-third of the Senate to hold up ratification of a treaty had been eviscerated by the President's action. *Id.* at 697. Similarly, in *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000), one half of one house, plus one, should have been enough to grant standing, since that vote would have been sufficient to prevent a declaration of war from passing. *See also* *Kerr v. Hickenlooper*, 824 F.3d 1207, 1212–13 (10th Cir. 2016). Upon remand from the Supreme Court following *Arizona Independent Redistricting Commission*, the Tenth Circuit reversed its earlier holding of standing for individual Colorado legislators, distinguishing them from the Colorado Legislature as an institution. *Kerr v. Hickenlooper*, 744 F.3d 1156 (10th Cir. 2014), *vacated and remanded*, 135 S. Ct. 2927 (2015).

184. A declaration by Congress authorizing a lawsuit would have the additional benefit of insuring that there is, in fact, a live controversy between the legislative and executive branches regarding the public policy behind the law not being enforced. Professor Sant'Ambrogio considers Presidential nonenforcement as a potentially beneficial practice where public favor regarding a law has changed in the intervening years, yet structural impediments prevent a repeal. *See* Sant'Ambrogio, *supra* note 86, at 377. By restricting standing to the Congress (or one house of Congress), when it has taken a vote to authorize the lawsuit, we can preserve that virtue, yet allow the judicial resolution of a true inter-branch dispute. Further, requiring such a resolution of authorization solves the logical question of whether the current Congress is harmed by nonenforcement of a statute passed by an earlier Congress. *See* Harrison, *supra* note 166, at 114 (insisting that the plaintiff be Congress, or one house thereof, also serves to limit the number of cases that will be brought, as compared to allowing any individual member of Congress the right to sue); Stern, *supra* note 1, at 45 (opposing legislative standing because, among other reasons, of the potential multiplicity of lawsuits).

Dicta in several cases suggests the necessity, though not necessarily the sufficiency, of a formal authorizing vote for Congressional standing: “[T]his case, in which neither a House of Congress nor any congressional committee has issued a subpoena for the disputed information or authorized this suit, is not the setting for such unprecedented judicial action.” *Walker v. Cheney*, 230 F. Supp. 2d 51, 53 (D.D.C. 2002) (denying standing to the General Accounting Office, an arm of Congress, to obtain information from the Vice President regarding an executive branch task force); *see also* *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 727. (D.C. Cir. 1974) (en banc) (footnote omitted) (stating that “[w]hile the appeal was pending, the Senate on November 2 passed a resolution stating that the Select Committee is authorized to subpoena and sue the President and that the Committee, in subpoenaing and suing the President, was acting with valid legislative purposes and seeking information vital to the fulfillment of its legitimate legislative functions”).

185. *Raines*, 521 U.S. at 824.

by a house of Congress complaining about a President's failure to enforce a law is to vindicate a *winning* legislative vote. Therefore, when Congress asks a court to direct executive action on a validly passed law, there is no concern that members of Congress are attempting to win judicially what they could not win legislatively.<sup>186</sup>

There is one other reason *Raines* should not preclude Congress from suing for declaratory relief when the President fails to enforce a law: the Court mischaracterized the harm of which Senator Byrd complained. The plaintiff members of Congress, the Court reasoned, "have not alleged that they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated. In the vote on the Act, their votes were given full effect. They simply lost that vote."<sup>187</sup> Byrd's complaint was not that he lost a vote on the legislation that created the line-item veto; he complained that, with the line-item veto in place, his powers as a legislator would be diminished.<sup>188</sup> Although Senator Byrd did not bring up this specific example, one way of seeing how his powers were diminished by the line-item veto is to consider a bill combining something Senator Byrd wanted but the President did not, along with many other provisions the President did want.<sup>189</sup> After the line-item

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186. A clear articulation of this argument is that

any intrusion by the judiciary into a dispute between its coequal branches seems fraught with difficulties. The problems are multiplied when the plaintiff could have obtained from Congress the substantial equivalent of the judicial relief sought, because in such cases the court is asked to intrude into the internal functioning of the legislative branch itself.

McGowan, *supra* note 166, at 242. *See id.* at 250 n.37, 263 (citing a congressman's challenge to the nonpresidentially appointed status of members of the Federal Reserve's Open Market Committee after failing in his attempt to amend the law to require such appointment); *see also* Reuss v. Balles, 584 F.2d 461, 468 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 997 (1978)).

187. *Raines*, 521 U.S. at 824.

188. Describing Senator Byrd's complaint as viewed by the court of appeals, the Supreme Court in *Raines* said

[t]he court held that appellees' claim that the Act "dilute[d] their Article I voting power" was sufficient to confer Article III standing: "[Appellees'] votes mean something different from what they meant before, for good or ill, and [appellees] who perceive it as the latter are thus 'injured' in a constitutional sense whenever an appropriations bill comes up for a vote, whatever the President ultimately does with it. . . . Under the Act the dynamic of lawmaking is fundamentally altered. Compromises and trade-offs by individual lawmakers must take into account the President's item-by-item cancellation power looming over the end product."

521 U.S. at 817 (quoting *Byrd v. Byrd*, 956 F. Supp. 25, 31 (D.D.C. 1997)).

189. *See generally* TODD GARVEY, CONG. RESEARCH SERV., RL33667, PRESIDENTIAL SIGNING STATEMENTS: CONSTITUTIONAL AND INSTITUTIONAL

veto became possible, such a legislative approach would be unavailing. Thus, properly understood, Senator Byrd's position in *Raines* should have been enough to grant him standing because his structural legislative powers had been diminished. This institutional slight to Congress was the premise under which the line-item veto was eventually struck down by the Supreme Court, when the lawsuit was brought not by a U.S. senator, but by New York City (one of its federal grants had been line-item vetoed by President Clinton).<sup>190</sup>

*Coleman* lives, revived by *Arizona Independent Redistricting Commission*. This Article does not ignore that the Court took pains in the latter case to say it was ruling only in the context of a state legislature's suit, not a suit by Congress, and that separation of powers issues would be presented in the case of a congressional suit against the President not presented in the state legislature's lawsuit against a state commission.<sup>191</sup> Deference to states' authority to sort out their own powers, however, was the basis for the holding on the merits in *Arizona Independent Redistricting Commission*. Such a federalism concern suggests strongly that the Court be *more* circumspect of inserting itself into a claim by state legislators against other organs of state government<sup>192</sup> than it would be to resolve a dispute between the two branches of the federal government.<sup>193</sup> The

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IMPLICATIONS (2012), [www.fas.org/sgp/crs/natsec/RL33667.pdf](http://www.fas.org/sgp/crs/natsec/RL33667.pdf) [<https://perma.cc/4K6Z-5XKQ>] (noting the constitutional implications of a line-item veto).

190. *Clinton v. City of New York*, 524 U.S. 417, 448 (1998).

191. *Id.* at 2665 n.12. Contrast this view with Justice Breyer's dissent: "While I recognize the existence of potential differences between state and federal legislators, I do not believe that those differences would be determinative here, where constitutional, not prudential, considerations are at issue." *Raines*, 521 U.S. at 843; *see also* Stern, *supra* note 1, at 41–42.

192. The defendant in *Coleman v. Miller* was an employee of the Kansas Senate; the plaintiffs were Kansas state senators. *Coleman v. Miller*, 307 U.S. 433, 433 (1939). One might have thought it appropriate for the U.S. Supreme Court to leave the resolution of the dispute to the Kansas Senate, which could have ordered its employee to send a notice to the U.S. Congress to disregard the previous notice of ratification of the proposed U.S. Constitutional amendment. *Id.* at 436. The D.C. Circuit, in dicta in *Campbell v. Clinton*, tried to evade that conclusion by speculating, without more, that such a notice might not have been accepted by the Congress. *Campbell v. Clinton*, 203 F.3d 19, 22–23 (D.C. Cir. 2000). If that were so, however, the *Coleman* court should have dismissed the case as moot.

193. If a subsequent U.S. Supreme Court ruling advances this distinction—denying standing to federal legislators, while having granted it to state legislators—a federalism-based desire not to judge other branches of the national government is a weak reed on which to base such different approaches. The Court has frequently considered itself to be competent to resolve competing institutional powers of the three federal branches, when legislators were not plaintiffs. For consideration of the absence of reluctance shown by the Supreme Court to insert itself in interbranch disputes, see generally *Clinton v. City of New York*, 524 U.S. 417 (1998) (discussing Congress ceding a line-item veto to the President);

Court has adopted a standing rule to allow a state legislature to seek relief against the usurpation of its power.<sup>194</sup> It would be odd for the Court to hold the Congress could not avail itself of the same relief.<sup>195</sup> At any rate, it has not done so.

#### 4. *Kennedy v. Sampson*: The Closest Case on Point

None of the foregoing cases on legislative standing, however, deals with a law passed by Congress that the President fails to enforce. Only one court decision is on point, the D.C. Circuit's opinion in *Kennedy v. Sampson*,<sup>196</sup> though two others have some similarity.<sup>197</sup> In *Kennedy*, Senator Ted Kennedy voted in favor of a

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*Mistretta v. United States*, 488 U.S. 361 (1989) (involving the President's power to remove members from a judicial organ, the U.S. Sentencing Commission); *Morrison v. Olson*, 487 U.S. 654 (1988) (regarding the authority for Congress to create a special prosecutor outside the direction of the President); *INS v. Chadha*, 462 U.S. 919 (1983) (concerning the President's deferring to one house of Congress that purported to veto his decision to parole individuals from deportation). *Cf.* *United States v. Nixon*, 418 U.S. 683 (1974) (enforcing a subpoena as a judicial instrument, against the President in a criminal investigation). *See generally* *Bowsher v. Synar*, 478 U.S. 714 (1986) (noting that the Court reached the merits of a case regarding proper executive and legislative roles in budget rescissions, though reserving on the specific issue of congressional standing).

194. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2665 (2015); *Coleman v. Miller*, 307 U.S. 433, 455–56 (1938).

195. For this reason, in his dissent in *Arizona Independent Redistricting Commission*, Justice Scalia opined that no legislator, state or federal, should have standing; he reserved special venom for *Coleman*, attempting to claim it was not actually a majority holding of the Court. *See Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. at 2696 (Scalia, J., dissenting). The majority explicitly ruled against his point of view. *Id.* at 2665 & n.13 (majority).

196. 511 F.2d 430 (D.C. Cir. 1974). The D.C. Circuit found standing. *Id.* at 436. At this time, prior to *Raines v. Byrd*, 521 U.S. 811 (1997), the D.C. Circuit was predisposed to legislator standing. For discussion of the D.C. Circuit's peregrinations on legislative standing, including its adoption of equitable discretion regarding whether or not to grant standing to legislators, see *Riegle v. Fed. Open Mkt. Comm.*, 656 F.2d 873, 880–81 (D.C. Cir. 1981). Granting Senator Kennedy standing in this case was made more powerful by the fact that it was not necessary to find legislator standing for there to be any review at all—a private party might have found standing in the facts of *Kennedy*. *See Kennedy*, 511 F.2d at 432. A physician expecting to benefit from a grant under the Family Practice of Medicine Act could have brought the same suit Senator Ted Kennedy did, complaining that since President Nixon did not order the bill enrolled as law, the National Institutes of Health did not make money available as the bill required. *See Public Health Service Act*, S. 3418, 91st Cong. § 761 (1970).

197. The case of concern here is where the legislature acts and the executive ignores it; that's why *Kennedy* is closest to point. Two other cases involve the situation where the legislature *failed to act*, but consequences resulted that could only come about from the legislature having acted. *See Coleman*, 307 U.S. at 433 (granting standing when the state senate did not approve the U.S. Constitutional Amendment, but it was sent off to the US Congress as though it had been approved anyway; standing granted); *Campbell*, 203 F.3d at 20–21, 24 (denying standing when Congress took a vote and decided not to declare war or authorize military action under the War Powers Act, but the President waged war anyway).

bill.<sup>198</sup> It passed both houses.<sup>199</sup> President Nixon held it until Congress had gone on holiday recess, and then announced he would not sign it.<sup>200</sup> He did not issue a veto. The President argued that when the tenth day after a bill was sent to him fell within a period when Congress was adjourned, the bill did not become law, by reason of Article I, section 7, of the U.S. Constitution.<sup>201</sup> Senator Kennedy argued that the holiday recess was not an adjournment that prevented the Congress from reconsidering it.<sup>202</sup> Hence, the bill, having been on the President's desk for more than ten days, automatically became law.<sup>203</sup>

The substantive issue at bar was whether the holiday recess constituted an adjournment within the meaning of Article I, section 7.<sup>204</sup> But the standing issue turned on Senator Kennedy's complaint that his interest as a senator had been negatively affected when a bill for which he had voted failed to be enforced by the President.<sup>205</sup> The D.C. Circuit held in favor of Kennedy as to both standing and the merits.<sup>206</sup>

### 5. Two Kinds of Legislative Interests

There are two kinds of interests that Congress might assert relevant to executive nonaction.<sup>207</sup> The first is Congress' interest in

198. See *Kennedy*, 511 F.2d at 432.

199. *Id.* at 432 & n.3.

200. *Id.*

201. *Id.*

202. *Id.* at 437.

203. *Id.* at 433.

204. *Id.*

205. *Id.* at 436.

206. *Id.* at 433 (“Two questions are presented for review: (1) does appellee have standing to maintain this suit; and (2) did S. 3418 become a law? We conclude that both questions must be answered in the affirmative.”). Subsequently, in *Goldwater v. Carter*, the D.C. Circuit distinguished two kinds of injury a legislator might suffer, and indicated that the interest simply in seeing a duly passed law be enforced was not sufficiently institutional. *Goldwater v. Carter*, 617 F.2d 697, 701 (D.C. Cir. 1979) (en banc), *judgment vacated*, 444 U.S. 996 (1979) (mem.). The D.C. Circuit's opinion was vacated by the Supreme Court, so it has no precedential value; and *Kennedy v. Sampson* has never been overruled. *Goldwater*, 444 U.S. at 996. See McGowan, *supra* note 166, at 241.

207. Commentators critical of legislative standing recognize this distinction, and focus their opposition to cases where Congress simply wants to see its policies implemented, rather than the narrower set of cases where Congress complains of being deprived of an institutional prerogative. See, e.g., Harrison, *supra* note 166, at 105, 110 (using the phrase “impair the legislative power” for the second kind of case).

Professor Greene notes the Third Circuit made precisely this distinction. Abner S. Greene, *Interpretive Schizophrenia: How Congressional Standing Can Solve the Enforce-But-Not-Defend Problem*, 81 FORDHAM L. REV. 577, 584–85 (2012). In *Russell v. DeJongh*, 491 F.3d 130 (3d Cir. 2007), the Third Circuit explained

seeing its laws enforced. Reasonable criticism has been raised about whether this is adequate injury for standing purposes,<sup>208</sup> since all U.S. citizens have an interest in the implementation of laws that their representatives passed. Once the law is enacted, this point of view maintains, members of Congress do not possess any special interest separate from any of their constituents.<sup>209</sup> Nevertheless, the phrasing of *Coleman*, embraced anew by the U.S. Supreme Court in *Arizona Independent Redistricting Commission*, would allow this interest to be sufficient, as explained above.<sup>210</sup> Such an interest was also held sufficient by Justices Alito and Thomas in their dissent in *United States v. Windsor*,<sup>211</sup> the case striking down the Defense of Marriage Act, members of Congress had intervened to represent their own interest in seeing the Defense of Marriage Act upheld.<sup>212</sup>

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[t]he principal reason for this is that once a bill has become law, a legislator's interest in seeing that the law is followed is no different from a private citizen's general interest in proper government. . . . The Supreme Court has "consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." The courts have drawn a distinction, however, between a public official's mere disobedience of a law for which a legislator voted—which is not an injury in fact—and an official's "distortion of the process by which a bill becomes law" by nullifying a legislator's vote or depriving a legislator of an opportunity to vote—which is an injury in fact.

*Id.* at 135 (citations omitted).

208. See generally Harrison, *supra* note 166 (discussing various arguments for congressional standing); Nash, *supra* note 166 (arguing for limited congressional standing). But see, e.g., Greene, *supra* note 207, at 582.

209. Greene, *supra* note 207, at 585 (citing *Daughtery v. Carter*, 584 F.2d 1050 (D.C. Cir. 1978)) ("The main point was that the Congresspersons shared an interest that all citizens have in presidential enforcement of the law, and thus stated a generalized grievance, insufficient for standing.").

210. See *supra* note 173–74 and accompanying text; see *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2665 (2015) (explaining that "*Coleman*, as we later explained in *Raines*, stood 'for the proposition that legislators whose votes would have been sufficient to . . . enact . . . a specific legislative Act have standing to sue if that legislative action . . . does not go into effect[], on the ground that their votes have been completely nullified.'").

211. 133 S. Ct. 2675 (2013).

212. See *id.* at 2695–96, 2684. In *Windsor*, the Court held there to be sufficient concrete adversity between the plaintiffs and the U.S. Treasury, which had refused to make an estate tax refund following the Defense of Marriage Act, even while the Justice Department refused to defend the Defense of Marriage Act: "the Attorney General of the United States notified the Speaker of the House of Representatives, pursuant to 28 U.S.C. § 530D, that the Department of Justice would no longer defend the constitutionality of DOMA's § 3." *Id.* at 2683. Justices Alito and Thomas, however, did discuss this distinction, since there were congressional intervenors who claimed harm from not having

The second kind of interest arises when the executive nonaction interferes with the ability of Congress to perform its functions. This occurrence is closer to the actual situation in *Coleman v. Miller*. Though the defendant in that case, Mr. Miller, was the secretary of the Kansas Senate (an officer of the legislature, not the executive), the action he took prevented the Kansas senator plaintiffs from exercising their prerogatives under the Kansas Constitution.<sup>213</sup>

Another illustration of this second kind of interest arises when a committee of Congress seeks information held by the executive

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the Defense of Marriage Act defended. *Id.* at 2712 (Alito, J., dissenting). The two justices admitted there was a distinction between members of Congress complaining about an impediment to their legislative functioning, and complaining that a law they had passed was not being defended by the executive branch; but they held the distinction to be immaterial. *Id.* at 2712–14. Both kinds of cases were justiciable, in those justices' opinion. *Id.*

In *INS v. Chadha*, the Court suggested that Congress suffered a similar injury whenever federal legislation it had passed was struck down, noting that it had “long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional.” 462 U.S. 919, 940 (1983). In his dissent, Alito speaks to an attempted distinction between *Chadha* and *Windsor*:

The United States attempts to distinguish *Chadha* on the ground that it “involved an unusual statute that vested the House and the Senate themselves each with special procedural rights—namely, the right effectively to veto Executive action.” But that is a distinction without a difference: just as the Court of Appeals decision that the *Chadha* Court affirmed impaired Congress's power by striking down the one-house veto, so the Second Circuit's decision here impairs Congress's legislative power by striking down an Act of Congress. The United States has not explained why the fact that the impairment at issue in *Chadha* was “special” or “procedural” has any relevance to whether Congress suffered an injury. Indeed, because legislating is Congress's central function, any impairment of that function is a more grievous injury than the impairment of a procedural add-on.

*Windsor*, 133 S. Ct. at 2713 (2013) (Alito, J., dissenting) (citation omitted).

213. 307 U.S. at 436. For other examples of this kind of interest, where legislator standing was upheld, see *Kerr v. Hickenlooper*, 744 F.3d 1156, 1157 (10th Cir. 2014), *vacated and remanded*, 135 S. Ct. 2927 (2015) (granting standing to Colorado legislators to challenge a voter initiative limiting the legislators' ability to impose tax increases); *Moore v. U.S. House of Representatives*, 733 F.2d 946, 954 (D.C. Cir. 1984) (granting standing to members of the House who sued Congress because a tax bill became law although it did not originate in the House); *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53, 58 (D.D.C. 2015) (granting standing to House of Representatives to challenge expenditure of money by the executive branch outside of an appropriation; but denying standing regarding President's suspension of applying the Affordable Care Act during 2014); *U.S. House of Representatives v. U.S. Dep't of Commerce*, 11 F. Supp. 2d 76, 85 (D.D.C. 1998) (noting that the House's need to have correct information on population to do reapportionment of congressional districts with integrity was impaired by the executive branch's reliance on population sampling techniques and granting standing).

branch important to Congress' constitutional functions.<sup>214</sup> In the midst of the Watergate investigation, Congress passed, and President Nixon allowed to become law without veto or signature, a statute creating jurisdiction in the United States District Court for the District of Columbia for the Senate Select Committee on Presidential Campaign Activities to enforce its subpoenas against the executive branch.<sup>215</sup> The D.C. Circuit analyzed this law in its opinion in *Senate Select Committee on Presidential Campaign Activities v. Nixon*,<sup>216</sup> not intimating any constitutional infirmity in the opinion. However, the D.C. Circuit upheld the trial court's decision to quash the subpoena sought by the Senate committee in that case, upon a balancing of the equities.<sup>217</sup> The D.C. Circuit reasoned that, balanced against the President's executive privilege interests, the interest asserted by the Senate select committee was weaker as it was only generally legislative in nature. The D.C. Circuit suggested that interest of a

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214. Sant'Ambrogio, *supra* note 1, at 1934 (footnote omitted) (explaining that "when Congress subpoenas an executive official and the official refuses to comply with the subpoena, Congress has standing to compel the executive's compliance in court. The executive's failure to produce the officer or documents injures Congress in a concrete and actual way"). See also Nash, *supra* note 166, at 374.

Seeking a declaratory judgment is not the same as asking a court to order the executive to comply with a congressional subpoena for specific information held by the executive. For separation of powers concerns, however, it is quite similar, involving the third branch to help the first branch do its duty relative to matters where the second branch has not been forthcoming. The Constitution does not give Congress the right to go to court to obtain information relative to oversight; rather, it has been inferred. Nash, *supra* note 166, at 364, 373–75. Since the Constitution does give the House the power to impeach, U.S. CONST. art. I, § 3; it should be an easier inference that that power encompasses standing to go to court when relevant to its impeachment deliberations.

The function of a court can be quite similar, as well. In considering whether the President's nonenforcement of a statute is unlawful, a court might consult material produced by subpoena, regarding inter-agency communications, for instance, on why an enforcement action was not taken.

Professor Nash, in noting that the D.C. Circuit had said impeachment was an alternative remedy to the members suing President Clinton over his illegally commencing war, opined that impeachment was inappropriate. Nash, *supra* note 166, at 362–63, 388. The process of considering impeachment, however, is a broader power than impeaching, just as Nash argued the process of considering a vote is broader than actually voting, thus extending to information gathering. *Id.* at 363, 374–75. In advocating a functional approach to Congressional standing, Nash identifies two congressional interests: voting authority and the authority to gather information. *Id.* at 378, 386. But if functionalism is to be our guide, the authority to seek a declaratory judgment that might be of aid to the impeachment power should qualify as much as gathering information for possible legislation or oversight.

215. Act of Dec. 16, 1973, Pub. L. 93-190, 87 Stat. 736 (1973).

216. See Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 727 (D.C. Cir. 1974) (en banc).

217. *Id.* at 729.



grand jury, or the House Judiciary Committee by contrast, would prevail because those bodies were focused on specific crimes or impeachable offenses: “[t]here is a clear difference between Congress’s legislative tasks and the responsibility of a grand jury, or any institution engaged in like functions.”<sup>218</sup> One such “institution engaged in like functions” was clearly the House Judiciary Committee, then looking into impeachment:

In the circumstances of this case, we need neither deny that the Congress may have, quite apart from its legislative responsibilities, a general oversight power, nor explore what the lawful reach of that power might be under the [Senate] Committee’s constituent resolution. Since passage of that resolution, the House Committee on the Judiciary has begun an inquiry into presidential impeachment. The investigative authority of the Judiciary Committee with respect to presidential conduct has an express constitutional source.<sup>219</sup>

Importantly, that House Judiciary Committee eventually voted out articles of impeachment, one of which charged President Nixon with failing “to take care that the laws were faithfully executed.”<sup>220</sup>

An impeachment proceeding, therefore, would present the clearest case for congressional standing to seek a declaratory judgment that a President’s nonenforcement of a statute was unlawful.<sup>221</sup> The House Judiciary Committee would ask a court to rule

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218. *Id.* at 732.

219. *Id.*

220. H. COMM. ON THE JUDICIARY, IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, H.R. REP. NO. 93-1305, at 3 (1974). That committee stated that

[h]e has failed to take care that the laws were faithfully executed by failing to act when he knew or had reason to know that his close subordinates endeavored to impede and frustrate lawful inquiries by duly constituted executive, judicial, and legislative entities concerning the unlawful entry into the headquarters of the Democratic National Committee, and the cover-up thereof, and concerning other unlawful activities including those relating to the confirmation of Richard Kleindienst as Attorney General of the United States, the electronic surveillance of private citizens, the break-in into the offices of Dr. Lewis Fielding, and the campaign financing practices of the Committee to Re-elect the President.

*Id.* at 3–4.

221. Greene, *supra* note 207, at 591 (stating that “Congress could begin impeachment proceedings, or try to tie the President’s hands in other ways, but these are costly and complex and, more to the point, not directly responsive to the matter at hand. Why not get all three branches into the mix?”). Professor Greene sees the impeachment power as tangential to the concern of standing; I see it as fundamental. Because the House has the explicit constitutional power of impeachment, it has standing to seek a declaratory judgment that could be valuable in exercising that function, an interest apart from the

whether the President's failure to enforce a law was arbitrary and capricious under administrative law standards, or discriminatory under a constitutional standard.<sup>222</sup>

Rather than compelling the House Judiciary Committee to commence impeachment proceedings before granting standing for a declaratory judgment, a federal court could take cognizance of the fact that the impeachment power *could* extend to a failure to enforce a law as an instance of the President's failure to take care that the laws be faithfully executed. That would create an "express constitutional source" for a declaratory judgment sought by the House.<sup>223</sup>

The possibility of impeachment would, of course, raise concerns under the political question doctrine. A federal court would be strongly tempted to note that what constitutes "high [c]rimes and [m]isdemeanors"<sup>224</sup> is constitutionally committed to another branch: the House of Representatives.<sup>225</sup> That is true; but that is not what the House would be asking a federal court to determine. The court would be asked whether a particular instance of a President's failure to act was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," under the long-settled jurisprudence of the

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generalized interest all citizens might have in the enforcement of a duly passed law. Professor Greene and I both conclude, however, that it is desirable to "get all three branches into the mix." *Id.*

Similar to Professor Greene in seeing impeachment as separate from—as opposed to a premise—for congressional litigation, is Bethany Pickett who in her student note stated

impeachment proceedings are an extreme remedy to presidential nonenforcement. Courts should not encourage impeachment "as a[] preferable alternative to a peaceful judicial determination of constitutional parameters." Primarily, the President may be a popular president whose performance is exemplary in every other area. Judicial intervention is preferable to impeachment because it addresses the President's particular area of wrongdoing, instead of broadly attacking the President and, in effect, throwing the baby out with the bathwater.

Pickett, *supra* note 182, at 465 (footnotes omitted).

222. 5 U.S.C. § 706(2)(A) (2012) (setting out the arbitrary and capricious standard); 28 U.S.C. § 1983 (2012) (establishing a right to bring suit for a violation of Constitutional rights). *See supra* Section IV.C.

223. *See* Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 732. (D.C. Cir. 1974) (en banc).

224. U.S. CONST. art. II, § 4.

225. *Id.* art. I, § 2, cl. 5. *See* Baker v. Carr, 369 U.S. 186, 217 (1962) (noting that "a textually demonstrable constitutional commitment of the issue to a coordinate political department" is one of the factors on which a federal court should decline jurisdiction of a case under the political question doctrine).

Administrative Procedure Act,<sup>226</sup> or violative of a constitutional right under § 1982 of the United States Code. If the President raised the defense that his inaction was necessary to avoid violating the Constitution, then the court would rule on that defense in the course of its judgment. Should a court decide against the President, the House of Representatives would decide whether the President's failure to act constituted an impeachable offense. In doing so, the House can choose to base its decision on court rulings. For instance, the House could certainly take cognizance of a court decision reached in a lawsuit in which Congress was not a party. The House might have considered President Nixon's impoundment of funds appropriated for New York City to be impeachable, based on the Supreme Court's having held his action to be unlawful in *Train v. City of New York*.<sup>227</sup> Every federal court involved in *Train*, right up to the Supreme Court, knew that its holding might have been the basis for impeachment; but each issued a ruling nonetheless.<sup>228</sup> What the House of Representatives might choose to do following a federal court ruling does not make the issue before the court a political question.

Whether the House Judiciary Committee would proceed to consider impeachment in any given instance of executive nonaction would likely be informed by the President's reaction to a declaratory judgment. The President might ignore the court's ruling. However, he might instead use the occasion of a judicial ruling against him to reconsider and alter his behavior in some way. Whether such modified enforcement was sufficient or not would be within the judgment of the House Judiciary Committee. A superficial, minimalist, begrudging enforcement of a statute might not satisfy that committee—it would be hard for a court to make such a decision. How much enforcement is enough is not an easy determination for a court to make.<sup>229</sup> It would, however, be an entirely appropriate political decision by the House Judiciary Committee.

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226. 5 U.S.C. § 706(2)(A) (2012). “An action in a court of the United States . . . stating a claim that an agency or an officer or employee thereof acted *or failed to act* in an official capacity or under color of legal authority shall not be dismissed . . . that it is against the United States.” *Id.* § 702 (emphasis added).

227. *Train v. City of New York*, 420 U.S. 35, 35 (1975).

228. In effect, that is also what the Supreme Court's 8–0 opinion did in *United States v. Nixon*, 418 U.S. 683 (1974). The Court could have dodged the case, asserting separation of powers and political question concerns, for instance. The result of that judicial nonaction would have been to leave the House without crucial evidence about possible wrongdoing, causing a bill of impeachment to proceed on speculation, if it proceeded at all. But the Court did rule, knowing the consequences.

229. See *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007); *supra* Section IV.B.

C. *Summary of Legislative Standing to Challenge Nonenforcement*

The U.S. Supreme Court has most recently reaffirmed the requirements for standing in the following words: “A party has standing only if he shows that he has suffered an ‘injury in fact,’ that the injury is ‘fairly traceable’ to the conduct being challenged, and that the injury will likely be ‘redressed’ by a favorable decision.”<sup>230</sup>

When a President fails to enforce a law, Congress should be able to challenge the inaction. The injury in fact is that congressional votes resulting in the passage of a law have been completely nullified.<sup>231</sup> Normal prosecutorial discretion is anticipated when Congress passes a law,<sup>232</sup> so no injury is suffered by Congress through that practice. Undermining the structure of a law, however, does injure Congress. Years of administrative law jurisprudence has built up the means of distinguishing permissible agency discretion from action undermining a statute.<sup>233</sup> The congressional resolution authorizing such a lawsuit shows that the current Congress maintains the interest it had in seeing put into effect the law that it (or a previous Congress) had passed.<sup>234</sup>

230. *Wittman v. Personhuballah*, 136 S. Ct. 1732, 1736 (2016) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (alteration in original). *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

231. *Coleman v. Miller*, 307 U.S. 433, 438 (1939).

232. *See* III ADMINISTRATIVE LAW TREATISE, *supra* note 109, § 17.1, at 1559.

233. *Id.* at § 17.2, at 1565–68. This distinction has been noted by a leading treatise:

At least part of the solution to the problem of agency discretion must lie in judicial review of agency actions. The courts can confine agencies within constitutionally permissible boundaries to the extent that the Constitution provides justiciable standards. In the U.S. system of government, with policymaking power divided between separately elected Legislative and Executive Branches, the judiciary also is required to confine agency discretion within statutorily permissible boundaries. . . . Courts also can reduce the potential for agencies and agency employees to engage in selective exercise of discretionary power for arbitrary or impermissible purposes.

*See id.* § 17.2, at 1565.

Choosing not to pursue a specific case is permissible, but choosing to ignore an entire category of behavior envisioned in the balance, which Congress wrote into a statute, would be impermissible. Creating prosecutorial priorities is permissible, ignoring a specific area of authority for rulemaking is not. *See* discussion *supra* Section IV.C.

234. *See, e.g., H.R. Res. 676*, 113th Cong. (2014) (enacted) (“*Resolved*, That the Speaker is authorized to initiate or intervene in one or more civil actions on behalf of the House of Representatives in a Federal court of competent jurisdiction to seek any appropriate relief regarding the failure of the President, the head of any department or agency, or any other officer or employee of the executive branch, 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 any provision of the Patient Protection and Affordable Care Act, title I or subtitle B of title II of the Health Care and Education Reconciliation Act of 2010, including any amendment made by such provision, or any other related

The first two prongs of the requirement of standing are thus met: there is injury in fact, and it is traceable to the President's nonenforcement.

As for the third prong of standing, a declaratory judgment against the President is "likely" to cause him to enforce the law, thus granting relief.<sup>235</sup> This is especially true if the declaratory judgment is sought by the House, which has the authority to commence impeachment proceedings. An actual impeachment process should not need to have been initiated; the latent threat should be sufficient to convince a court that granting the requested declaratory judgment would be likely to bring relief.

Dicta from the D.C. Circuit suggests that the House would suffer an additional kind of injury if it issued a subpoena to the President in aid of an investigation and the President refused to respond to it.<sup>236</sup> This kind of harm fits the category of institutional injury, beyond simply a desire to see duly enacted laws enforced. Two specific constitutional provisions add strength to the House's standing: its impeachment role, and the President's duty to take care that the laws be faithfully executed.<sup>237</sup> A subpoena in aid of the House's ability to judge the latter in the potential context of the former is a precise basis for standing. An analogy can be drawn between the desire of the House of Representatives, or the House Judiciary Committee, to obtain subpoenaed information, and the need of the House or the House Judiciary Committee for a declaratory judgment about the President's nonenforcement of a law.<sup>238</sup>

#### CONCLUSION

Executive action in excess of constitutional authority can be checked in the courts. So also can executive nonaction.

Where the President's power is exclusive, the President, of course, may take action. Where the Congress' power is exclusive, executive action can be enjoined, and executive nonaction is not logically a problem. Where the President and Congress share power, Congress can occupy the field and make independent executive action

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provision of law, including a failure to implement any such provision . . ."). This law authorized the lawsuit in *Burwell*. See U.S. House of Representatives v. *Burwell*, 130 F. Supp. 3d 53, 63 (D.D.C. 2015).

235. See *supra* note 229 and accompanying text.

236. Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 727 (D.C. Cir. 1974) (en banc).

237. U.S. CONST. art. I, §§ 2–3, art II, § 3.

238. See *supra* notes 190–91 and accompanying text.

unlawful. Ambiguity as to whether Congress has done so can be diminished by explicit wording in laws to the effect that Congress intends to occupy the field, to the exclusion of executive action. Without such explicit language, a court must determine from the scheme of the legislation whether Congress intended its structure to be exclusive of executive action. If so, a court can enter an injunction against the executive action.

If the President has failed to enforce a law passed by Congress, a court will be able to order relief where a plaintiff can identify a precise benefit to which they are entitled. A *qui tam* action can also force the collection of money owed to the government from a private party. In another narrow set of cases, a negative injunction will be available which, while not compelling executive action to enforce a law in the way a President does not wish to enforce it, will nevertheless enjoin his enforcing the law in other contexts where he does wish to enforce it.

Outside of those instances, executive nonaction does not lend itself to judicial resolution by injunctive relief. A declaratory judgment, however, could be brought claiming that such nonaction was unlawful. That would provide a sufficiently concrete remedy because of the likelihood the President would adjust his behavior in the face of such a declaratory judgment. When the plaintiff is the House of Representatives, this is especially likely because of the House's responsibility under the impeachment clause, even if an actual impeachment motion were not under active consideration. The House would have a further basis for standing in that a declaratory judgment would be directly relevant to its need to gather information in its constitutional function of impeachment.

The cases on legislators' standing would permit such a suit. The President can defend his nonenforcement on the grounds that the requested enforcement would be unconstitutional, or that his failure to enforce reflects no more than discretion operating under neutral principles (such as conserving scarce enforcement resources) that did not constitute an assault on the structure of the law passed by Congress.

