Presidential Non-Enforcement and the Rule of Law

Introduction

The rule of law is valuable because it fosters two types of equality in society. First, the rule of law fosters vertical equality between public officials and non-officials. Vertical equality ensures that public officials do not use their law-creating and law-enforcing authority to benefit themselves over non-officials, who are citizens that do not have law-creating or law-enforcing authority. Second, the rule of law fosters horizontal equality between all citizens. When laws are fairly enforced and uniformly govern all, citizens are freer to exercise their individual liberty because equality under the law is necessary in order to establish equal opportunity.

One of the common sense requirements underlying the successful rule of law is prohibiting officials from arbitrarily deciding when a legitimately passed law will be enforced. In the United States, this manifests as “presidential non-enforcement.” Presidential non-enforcement refers to the situation when a President refuses to enforce a legitimately passed law. A historical example of presidential non-enforcement is when President Andrew Johnson refused to abide by the Tenure in Office Act, which prohibited the President from removing a cabinet officer without the advice and consent of the Senate. Johnson disregarded the Tenure in

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1 See generally Paul Gowder, The Rule of Law and Equality, LAW AND PHILOSOPHY (forthcoming 2013) (manuscript at 2-3) (on file with author).
2 Id. at 4.
3 I do not discuss the distinction between citizens and non-citizens in this paper.
4 Gowder, supra note 1, at 5.
5 Scholars have applied inconsistent labels to the instances when a President refuses to enforce a law that has been legitimately enacted into force. Some labels include “presidential disregard” and “executive non-execution,” among others. In this comment, I use the phrase, “presidential non-enforcement.” However, “presidential non-enforcement” can be used interchangeably salva veritate with the other labels. Moreover, this analysis also applies to U.S. state governors or any other official who has authority to control the enforcement of a law in virtue of being the head of the executive branch of the government.
6 Presidential non-enforcement of a law involves the non-enforcement of an otherwise legitimate law, meaning that the law has satisfied both the bicameralism and presentment requirements enumerated by the Constitution. See Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983). The bicameralism requirement demands that the bill must be passed by both the House of Representatives and the Senate. The presentment requirement demands that the bill be presented to the President for either his signature or his veto. If the President decides to veto the bill, then Congress can override his veto with a two-thirds majority vote. U.S. Const. art. 1, §6, cl. 3.
7 See generally ERIC L. MCKITRICK, ANDREW JOHNSON AND RECONSTRUCTION (1988); see also Tenure of Office Act, ch. 154, Sec. 1, 14 Stat. 430 (1867).
Office Act by ordering the removal of the Secretary of War without the advice and consent of the Senate.\textsuperscript{8} The threat of presidential non-enforcement continues to be relevant today. President Barack Obama has directed federal agencies to refuse to enforce portions of immigration laws, education reform laws, anti-drug laws, and other laws that Congress refused to repeal or reform at his request.\textsuperscript{9} More common, albeit less aggressive, versions of presidential non-enforcement are a President’s refusal to defend a law in court and presidential signing statements. A contemporary example of a President’s refusal to defend a law in court is Obama’s refusal to defend the Defense of Marriage Act in federal court.\textsuperscript{10} Likewise, President George W. Bush frequently used signing statements to object to laws passed by Congress.\textsuperscript{11}

\textsuperscript{8} The Supreme Court eventually ruled that the act unconstitutionally infringed upon the President’s removal powers. Myers v. United States, 272 U.S. 52 (1926). However, the Court never had the opportunity to address the constitutionality of the Tenure in Office Act until 1926, which is more than fifty years after Johnson \textit{de facto} suspended the Tenure in Office Act.\textsuperscript{9} See, e.g., Steve Friess, Obama’s policy strategy: Ignore laws, POLITICO (June 16, 2012, 8:21 PM), http://www.politico.com/news/stories/0612/77486.html (citing a White House official, who states, “We work to achieve our policy goals in the most effective and appropriate way possible,” the official said. “Often times, Congress has blocked efforts (ie [No Child Left Behind] and DREAM) and we look to pursue other appropriate means of achieving our policy goals . . .”).\textsuperscript{10} Most scholars argue that a President may constitutionally refuse to \textit{defend} a law in court for a variety of reasons. One particularly persuasive reason is that Congress will be a stronger advocate for the law if the President has publically indicated that he does not want to defend the law. See, e.g., Statement of the Attorney General on Litigation Involving the Defense of Marriage Act, available at http://www.justice.gov/opa/pr/2011/February/11-ag-223.html; \textit{Executive Discretion and the Congressional Defense of Statutes}, 92 YALE L.J. 970 (1983); James W. Cobb, By "complicated and indirect" Means: Congressional Defense of Statutes and the Separation of Powers, 73 Geo. Wash. L. Rev. 205, 206-07 (noting that Congress has historically involved itself in defending statutes, such as in INS v. Chadha, 462 U.S. 919 (1983), Bowsher v. Synar, 478 U.S. 714 (1986), and Buckley v. Valeo, 424 U.S. 1 (1976)). More recently, President Barack Obama ordered the U.S. Department of Justice (DOJ) to no longer defend the constitutionality of the Defense of Marriage Act (“DOMA”). See Statement of the Attorney General on Litigation Involving the Defense of Marriage Act, available at http://www.justice.gov/opa/pr/2011/February/11-ag-223.html. The U.S. House of Representatives Bipartisan Legal Advisory Group directed the House General Counsel to initiate the defense of DOMA using outside counsel. See Chris Geidner, \textit{House Republicans Vote to Defend DOMA in Court on Party Line 3-2 Vote}, METRO WEEKLY (Mar. 9, 2011, 6:14 PM), http://metroweekly.com/poliglot/2011/03/house-republicans-vote-to-defe.html. In the instance of a President’s refusal to defend a law, Congress has the capacity to defend the law in court. Congress currently does not have a similar capacity when the President refuses to enforce a law. However, several justices on the Supreme Court have questioned whether refusing to defend a law in court is unconstitutional. See, e.g., Kevin Robillard, \textit{Scalia: 'New world' on enforcing DOMA}, Politico (Mar. 27, 2013, 11:23AM), http://www.politico.com/blogs/politico-live/2013/03/scalia-new-world-on-enforcing-dom-a160313.html?hp=r1 (describing sharp questioning by Justices Roberts, Scalia, and Kennedy about Obama’s refusal to defend DOMA).\textsuperscript{11} See, e.g., Michael J. Berry, Controversially Executing the Law: George W. Bush and the Constitutional Signing Statement (2009) (unpublished manuscript) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1450725). Presidential non-enforcement can be distinguished
Presidential non-enforcement presents a puzzle for the rule of law. A President is obligated by the Constitution to refuse to enforce a law he believes to be unconstitutional. Forcing the President to enforce a law he believes to be unconstitutional would be to force the President to act in a way that he believes unconstitutionally contravenes his Oath of Office to uphold the Constitution, which is the supreme law of the land. In other words, the President would be forced to act against the rule of law. However, the President’s refusal to enforce a law he believes to be unconstitutional out of respect for the Constitution seems to threaten the rule of law by weakening the court system, encouraging corruption, and weakening the legitimacy of the legal system. I will argue for two limitations on presidential non-enforcement to allow the President to uphold the rule of law without acting unconstitutionally. The first limitation is an “internal” limitation on the President to only refuse to enforce a law when he believes in good faith that the law is unconstitutional. The second limitation is an “external” limitation by members of Congress standing to challenge presidential non-enforcement in court in order to resolve the underlying constitutional question. Pushing the constitutional question to the courts increases the courts’ legitimacy as nonpolitical and impartial arbiters of the law while diffusing the risk of politician capture by special interests.

Part I of this paper will explain why the President is sometimes obligated to refuse to enforce a law. Part II will describe how presidential non-enforcement threatens the rule of law.

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12 See infra Part I.
13 Saikrisna Bangalore Prakash, The Executive’s Duty to Disregard Unconstitutional Laws, 96 GEO. L.J. 1613, 1631 (2008) (arguing that an unconstitutional law is not a valid law, and thus the President is not committing a constitutional injury when he refuses to enforce an unconstitutional law).
Part III will argue that the President should not enforce a law only when he has a good faith belief that the law is unconstitutional. Finally, Part IV will argue that certain legislators should have standing to challenge presidential non-enforcement as an external check to the President’s power, which I will argue is consistent with *Raines v. Byrd* and traditional separation of powers jurisprudence.\(^{14}\) In *Raines*, the Supreme Court held that legislators must demonstrate that their votes were effectively nullified in order to qualify for legislator standing.\(^{15}\) Presidential non-enforcement of an otherwise legitimate law suspends a legislator’s vote on that law so that their votes in favor of the law are virtually “overridden.”\(^{16}\) The rule of law concerns about presidential non-enforcement reflects similar separation of powers concerns the Court has about vote nullification.\(^{17}\) Thus, the Court should afford legislators standing when the laws that they voted for are subject to presidential non-enforcement in order to maintain the rule of law.

I. A President is Sometimes Obligated to Refuse to Enforce a Law

The Supreme Court has never directly addressed whether the President can refuse to enforce a law on the grounds that he believes that the law is unconstitutional. In *Myers v. United States*, the Court addressed a law that obligated the President to seek congressional consent to remove certain classes of Postmasters.\(^{18}\) A Postmaster sued the federal government after President Taft refused to abide by the law and removed him without the consent of Congress. The Court ruled in favor of Taft, but notably did not criticize Taft for refusing to abide by a

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\(^{14}\) 521 U.S. 811 (1997). In *Raines*, six legislators challenged the Line Item Veto Act of 1996 as an unconstitutional expansion of executive power. The Court held that the legislators did not have standing to bring the suit in part because they could only demonstrate that line item vetoes abridged their political power, which was an insufficiently concrete injury to afford standing. Brief for Appellee, *Raines v. Byrd*, 521 U.S. 811 (1997) (No. 96-1671), available in 1997 WL 251423, at 24.

\(^{15}\) Id. at 824.

\(^{16}\) Id.

\(^{17}\) See infra Part III.

\(^{18}\) See *Myers v. United States*, 272 U.S. 52 (1926).
Similarly, four justices in *Freytag v. Commissioner* stated that the President has the power not to enforce a law “when [the law is] unconstitutional,” but the plurality was unable to secure a fifth vote to constitute a majority opinion.

The Oath Clause of the Constitution suggests that the President’s obligations to the Constitution supersede any obligation he has to enforce a legitimately passed law that he believes is unconstitutional. The argument is as follows. The President, along with other non-judicial government actors, is empowered to interpret the Constitution. The President gives effect to his interpretation of the Constitution when he signs legislation, vetoes legislation, and nominates

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19 *Id.* Myers involved an attempt by Congress to appropriate an exclusive presidential power in violation of the separation of powers. Thus, the scope of Myers might be limited to the instances in which one branch of the government attempts to appropriate an exclusive power that belongs to a different branch of government. *C.f.* Prakash, *supra note* 13, at 1639-40 (claiming that the “President should be able to engage in ‘self-help’ [presidential non-enforcement, particularly when the law seeks to weaken presidential power at the benefit of Congress] because Presidents cannot secure judicial relief to safeguard their official powers and duties . . . Presidents cannot seek a declaratory judgment or an injunction when a statute infringes upon presidential powers. There would be no standing because the President would be complaining about how the branch he controls might enforce an unconstitutional law.”)


21 U.S. CONST. art. 2, § 1, cl. 8 (requiring the President to swear that he “will to the best of [his] Ability, preserve, protect and defend the Constitution of the United States”).

22 Some scholars disagree about the scope of the President’s constitutional powers to interpret the Constitution. Some have persuasively argued that the text of the Constitution and the constitutional structure both suggest that no branch of the government should be bound by the views of another on matters of legal interpretation. See generally Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267 (1996) (arguing that the text of the Constitution supports the concept of independent Presidential review). Consistent with Hamilton’s view in *The Federalist* No. 78, that the Constitution does not establish judicial supremacy (or what we now know as “final judgment” on constitutional issues) because all branches of government are mandated to uphold the Constitution.

23 *E.g.*, Sheryl Gay Stolberg, *Obama Signs Equal-Pay Legislation*, N.Y. TIMES (Jan. 29, 2009), http://www.nytimes.com/2009/01/30/us/politics/30ledbetter-web.html (President Barack Obama signing an equal pay bill into law in response to a hostile Supreme Court ruling because signing the bill into law “uphold[s] one of this nation’s first principles: that we are all created equal . . . ”); Barack Obama, *Remarks by the President at Reception Commemorating the Enactment of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act*, OFFICE OF THE PRESS SECRETARY (Oct. 28, 2009), http://www.whitehouse.gov/the-press-office/remarks-president-reception-commemorating-enactment-matthew-shepard-and-james-byrd- (suggesting “the rights afforded every citizen under our Constitution mean nothing if we do not protect those rights -- both from unjust laws and violent acts. And you understand how necessary this law continues to be [in protecting those rights]”).

Supreme Court justices, among other occasions. The Oath Clause obligates the President to protect and uphold the Constitution. If the President believes in good faith that a legitimately passed law is unconstitutional, then he is constitutionally obligated not to enforce that law because the act of enforcing the law would be in contravention to his Oath Clause obligation to protect and uphold the Constitution. The argument for presidential non-execution also independently lies in the intersection of the Supremacy Clause and the Faithful Execution Clause. The Supremacy Clause states that the Constitution is “the supreme Law of the Land.” The Faithful Execution Clause obligates the President to “faithfully execute the laws.” Together, these two clauses suggest that the President is obligated to refrain from taking actions that might violate the Supreme Law that he is obliged to faithfully execute. Presidential non-enforcement does not violate the Faithful Execution Clause even though the President is refusing to enforce an otherwise legitimate law is because the President is no more obligated to enforce an unconstitutional law than he is obligated to enforce a repealed law or a bill that has not yet been presented to the President for his or her signature or veto.

The President is arguably obligated to refuse to enforce an unconstitutional law even if he has signed that law into force. In certain circumstances, the President may be obligated to sign a bill that he knows contains unconstitutional provisions into law because the importance of the scientific advancement didn’t outweigh the “destruction of human life” as justification for vetoing a bill that would have authorized federal funding for embryonic stem cell research).

25 E.g., Barack Obama, Remarks by the President in Nominating Sonya Sotomayor to the United States Supreme Court, OFFICE OF THE PRESS SECRETARY (May 26, 2009), http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-in-Nominating-Judge-Sonia-Sotomayor-to-the-United-States-Supreme-Court (nominating Sotomayor in part because she understands that “a judge's job is to interpret, not make, law; to approach decisions without any particular ideology or agenda, but rather a commitment to impartial justice; a respect for precedent and a determination to faithfully apply the law to the facts at hand.”).

26 U.S. CONST. art. VI.

27 U.S. CONST. art. 2, § 3, cl. 4 (The President “shall take Care that the Laws be faithfully executed”).

28 Prakash, supra note 13, at 1616.

constitutional provisions of the law. 30 An example is when President Nixon was presented with the opportunity to renew the Voting Rights Act in 1970. The Act enforced the Fifteenth Amendment’s demands that voting rights not be abridged on account of race, but contained an unconstitutional provision that lowered the minimum voting age from twenty-one years to eighteen years in both federal and state elections. After unsuccessfully objecting to the unconstitutional portion of the proposed bill to no avail, President Nixon signed the law into force. The Supreme Court later struck down the unconstitutional portion of the law. 31

Thus, it is clear that the President must sometimes refuse to enforce a law in order to protect the rule of law. After all, the rule of law does not only involve the “thin” procedural requirements of the law’s administration, but the “thick” substantive requirements of the law’s fairness. 32 The President’s obligation not to enforce unconstitutional laws furthers the goals of the rule of law, namely equality and fairness.

II. Presidential Non-Enforcement Sometimes Threatens the Rule of Law

However, presidential non-enforcement also presents several threats to the rule of law. Presidential non-enforcement threatens the rule of law’s goal of promoting the legitimacy of fair, independent, and impartial courts. For example, imagine that a law limits the production of certain types of widgets and widget makers know that they can only advance weak legal arguments that are unlikely to overturn the law in court. Instead of turning to the courts to test out those arguments in a fair and open setting, widget makers could instead surreptitiously donate to a politician running for President with the tacit understanding that the politician will

30 William Baude, Signing Unconstitutional Laws, 86 Ind. L.J. 303, 310, 323-24 (2011). Baude’s argument is limited to whether a President can sign a bill he believes to be unconstitutional, and thus does not address whether Nixon would have been constitutionally empowered to refuse to enforce the unconstitutional provisions of the law. Nixon elected to enforce the provision of the law he believed to be unconstitutional. However, I believe that Nixon, in fact, would be obligated to refuse to enforce the provisions of the law that he believed to be unconstitutional.
refuse to enforce that law in exchange. Thus, citizens would be unsure about whether the President is enforcing the law in a fair, efficient, and competent manner or whether the politician is corrupt. Thus, presidential non-enforcement is distinct from instances of prosecutorial discretion because prosecutorial discretion relies on a set of policy considerations that the Supreme Court has recognized, such as “strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government’s overall enforcement plan.”

In other words, prosecutorial discretion is beneficial because it allows officials to strategically further the goals of the law in an efficient manner. In contrast, the President has no intent of enforcing the law more effectively by refusing to enforce the law. The purpose of refusing to enforce a law is to render the law dead.

Similarly, presidential non-enforcement threatens the rule of law’s goal of horizontal equality between citizens. If a President can decide whether a legitimately passed law is enforced during his or her administration, then the President is apt to be captured by special interest groups, who will push the President not to enforce certain laws that they disfavor. For example, if a rich investor was currently under investigation for insider trading, the investor could invest millions of dollars to elect a favored politician to office in exchange for that politician to refuse to continue any ongoing or future investigations into that state’s securities laws. Thus, citizens who are not wealthy enough to “purchase” a politician are disadvantaged by the captured politician’s enforcement of the rule of law.

Finally, presidential non-enforcement threatens the rule of law by causing citizens to be uncertain about whether a law is in effect, and thus weaken the legitimacy of the legal system. After all, U.S. Presidents are term-limited. Thus, one President can refuse to enforce a law only

33 See Wayte v. United States, U.S. 598, 607 (1985) (holding that prosecutorial discretion is constitutional).
to be reversed by his or her successor.\textsuperscript{34} This would undoubtedly create some measure of uncertainty within our system of government. This situation is clearly distinct from prosecutorial discretion, where criminals know that if they violate the law, then they have committed a civil wrong even if they are not punished by the state. The purpose of prosecutorial discretion is to increase the efficiency of enforcing a law \textit{writ large}.

\textbf{III. The Internal Limitation to Presidential Non-Enforcement: Constitutional Issues}

The justification for presidential non-enforcement is that the President is obligated to protect and defend the Constitution. When the President knowingly enforces laws he believes to be unconstitutional, then the President knowingly breaks his oath to the Constitution, which is the supreme law of the land.\textsuperscript{35} Thus, if the President lacks a good-faith belief that the law is unconstitutional, or if he is unsure about whether the law is unconstitutional, then the President is obligated to enforce the law.\textsuperscript{36}

Moreover, presidential non-enforcement based on mere policy preferences would give the President a \textit{de facto} veto power over Congress that could not be overridden. A \textit{de facto} veto power would eviscerate the need for the President’s formal veto power, which seems odd. Presidential non-enforcement should distinguishable from a presidential veto because the veto power is broad and final. It is broad in that the veto can be exercised for any reason whatsoever,

\textsuperscript{34} For example, Obama refused to enforce a law previously enforced by George W. Bush.

\textsuperscript{35} U.S. CONST. art. 2, § 1, cl. 8

\textsuperscript{36} Some scholars have argued that the President is constitutionally empowered to refuse to enforce a law even if he does not believe the law is clearly unconstitutional because the President should have the authority to interpret and construe the Constitution equal in power to Congress and the Supreme Court. Some scholars have furthered the argument that the President may only veto laws he believes to be clearly unconstitutional. See Saikrisna Bangalore Prakash, \textit{Why The President Must Veto Unconstitutional Laws}, 16 WM. & MARY BILL OF RTS J. 81, 83 (2007) (arguing that presidential non-enforcement power stems from the Presidential Oath Clause that obligates the President to “preserve, protect, and defend” the Constitution, and thus non-enforcement power is limited to constitutional issues). However, the question of Presidential authority to interpret the Constitution is distinct from, albeit related to, the question of executive non-enforcement. This Comment presumes the current status of the judiciary as the supreme expositor of constitutional law. Cooper v. Aaron, 358 U.S. 1, 18 (1958).
personal, political or constitutional. In contrast, a President should only refuse to enforce a law if he believes that law is unconstitutional. Moreover, a veto is potentially final in that if it is not overridden, then the veto precludes a bill from becoming law. No one can enforce a vetoed bill that never became law. In the case of presidential non-enforcement, a law is still viable even when a President refuses to enforce the law because the law’s enforcement is merely suspended. Presidents are term-limited. Thus, if a successor President believes that the non-enforced law is constitutional, then that President is obligated to enforce the previously inanimate law. Therefore, the President may only be motivated by his concern about the constitutional defects of a law if he refuses to enforce that law.

IV. The External Limitation on Presidential Non-Enforcement: Legislator Standing

Supporters of broad presidential non-enforcement powers have claimed that Congress is constitutionally empowered to check the President when he refuses to enforce a law. However, Congress cannot effectively check presidential non-enforcement because the doctrine of separated powers in theory has been subsumed by the political reality of separated parties in practice. The development of a two-party system in the United States, gerrymandering, and powerful centralized political party organizations have led to ideologically unified and cohesive political actors. This, in turn, has incentivized political actors from different branches of government to act with their political party loyalty in mind, rather than their loyalty to their

37 Saikrisna Prakash distinguishes presidential non-enforcement from a veto by relying on the narrow scope of presidential non-enforcement and the broader scope of a veto. Prakash, supra note 13, at 1634 (arguing that the veto power “can be exercised for any reason whatsoever, personal, political, or constitutional.”).
38 Id.
39 U.S. CONST. amend XXII (limiting a President to two four-year terms).
40 C.f. Thomas P. Crocker, Presidential Power and Constitutional Responsibility, 52 B.C. L. REV. 1551, 1554-55 (2011) (arguing that “presidents are constrained by virtues such as care and fidelity, by integrity in interpretive practices, and by the normative and structural obligations of office provide textual grounds for thick normative constraints on presidential power even in the absence of more robust structural constraints.”).
42 Id. at 2322-39.
institutional affiliation. A contemporary example of congressional allies defending the President at the cost of their own institution includes Senate Majority Leader Harry Reid’s defense of President Barack Obama’s recess appointment to the Consumer Financial Protection Bureau, despite the Senate holding pro forma sessions. This two-party system has increased the effectiveness of politician capture because special interest groups can focus their efforts on two distinct entities, rather than attempting to capture hundreds of different politicians.

This section will also describe the framework of legislator standing as enunciated in Raines v. Byrd and suggest that presidential non-enforcement of laws harms individual legislators qua legislators by nullifying their individual votes. The Court has recognized vote nullification as a narrow exception to the general rule against legislator standing. Legislator standing will allow individual congressmen to check presidential non-enforcement in furthering the rule of law.

A. Current Ineffective Checks of Presidential Non-Enforcement

The Constitution explicitly and implicitly grants Congress several formal methods to constrain presidential non-enforcement. However, these methods require that Congress, and its members, function as a self-interested institution. The reality of political party loyalty ensures that current congressional checks are insufficient to respond to improper presidential non-enforcement.

Impeachment is the “strongest medicine” available to Congress, but is also the most unlikely to be applied. In order to successfully impeach a President, the President’s opponents

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43 Seung Min Kim, Reid: Cordray appointment will stand, POLITICO (Jan 15, 2012, 12:09 PM), available at http://www.politico.com/blogs/politico-live/2012/01/reid-cordray-appointment-will-stand-110910.html. See also Levinson, supra note 41, at 2340 (“Empirical studies confirm, for instance, that presidential vetoes all but disappear during periods of unified government.”)
45 U.S. CONST. art. 2, § 4.
must successfully convince a majority in the House of Representatives to impeach the President. However, impeachment is not enough to oust a President from office. The articles of impeachment are then sent to the Senate, where the President’s opponents must secure a two-thirds majority in order to convict the President. Throughout the course of U.S. history, Congress has attempted (and failed) to impeach and convict only two Presidents. Regardless of the unlikely event of impeachment, presidential non-enforcement may not even constitute a “high crime or misdemeanor” as required by the Constitution. Thus, impeachment is a strong congressional power in theory, but impotent in practice.

Congress also has the power of the purse over executive administrative agencies, and can wield that power to coerce the President against non-enforcement. However, appropriation bills, like all bills, must be signed into force by the President. The President can decide to veto a bill should Congress attempt to cut off funds to presidential pet projects. A presidential veto on a spending bill would also impact federally-funded projects and agencies supported by individual legislators, which would probably decrease the support for an appropriations bill that is certain to be vetoed. The President’s allies in Congress can also defend him from attacks. Individual senators can hold up entire appropriations bills from reaching the floor, and can also lead filibusters to prevent entire bills from reaching the floor as well. Congress can also theoretically wield their power over administrative agencies by curtailing specific agencies’

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46 Presidents Andrew Jackson and Bill Clinton.
47 See Josh Chafetz, *Impeachment and Assassination*, 95 MINN. L. REV. 347, 351-52 (suggesting that impeachment is proper when it would be appropriate to assassinate a president); Representative Gerald Ford, House of Representatives, House Floor Speech: Impeach Justice Douglas, Apr. 15, 1970, available at http://www.ford.utexas.edu/LIBRARY/speeches/700415f.htm (“An impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history.”); cf. Nixon v. United States, 506 U.S. 224 (1993) (holding that the Senate had the “sole” power to try impeachments because it is a political question not for the courts to resolve).
48 U.S. Const. art. 1, § 8, cl. 1 (explicitly empowering Congress to tax and implicitly empowering Congress to spend).
jurisdictions and enforcement powers in order to promote better executive behavior. However, in order to do so, Congress would need to pass a new law or amend a current law, which is a legislative action that requires the President’s signature. The President is unlikely to sign a law or an amendment to a law that seeks to punish him.

Moreover, Congress can refuse to confirm presidential nominees. Senators have historically used the confirmation power to force the President to act in certain ways. Refusal to confirm presidential nominees to executive agencies is an easier task than stripping an agency of power, but the President can bypass the Senate’s refusal to confirm a presidential nominee by recess appointment. Placing holds or filibustering are very effective tools, but the President’s congressional allies will undoubtedly attempt to prevent a hold or filibuster of a presidential nominee. Moreover, increasing public scrutiny over individual holds and the filibuster raises the possibility that those tools may not be as available to members of Congress in the future.

An additional method that Congress can use to check presidential power is to hold public committee hearings on presidential non-enforcement or to institute an investigation into an executive agency, such as the Department of Justice or the Office of the Solicitor General. If an executive branch official refuses to testify in front of Congress, than Congress has the power to

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51 U.S. Const. art. 2, § 2 (requiring Senate consent for some presidential appointees, including “Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States”).
52 See, e.g., Press Release, Senator David Vitter, Vitter Releases Hold on Interior Nominee Dan Ashe (June 1, 2011), http://www.vitter.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=4c269bc1-802a-23ad-4bf0-1d48215312e1 (“[The Senator] placed his hold on a top Obama interior nominee in light of the administration issuing no deepwater exploratory permits. I said I would lift it when we got to 15 permits. We finally reached that mark today, and I'm lifting my hold.”).
53 Id.
55 See, e.g., Press Release, Senator Claire McCaskill, Bill to Eliminate Secret Holds Now on the Senate Calendar (July 28, 2010), http://www.mccaskill.senate.gov/?p=press_release&id=1058 (describes proposed legislation “to eliminate a senator's ability to obstruct legislation in secret.”).
56 Id.
hold that person as in contempt of Congress.\(^{56}\) However, it is unclear what coercive power mere testimony will have on the President’s power to not enforce laws. Congress can also require executive agencies to promptly inform Congress whenever it decides against enforcing a law.\(^{57}\) This requirement of transparency can be extended to requiring agencies to produce reports and audits. These formalistic requirements, however, do not provide a substantive barrier to presidential non-enforcement. When considering the politicization of congressional actors, Congress’s checks on the President will be ineffective, if wielded at all.

**B. A Call to Recognize Legislator Standing**

One might wonder why legislators, rather than the individuals who are harmed by presidential non-enforcement, should sue the president. If the act of presidential non-enforcement injures an individual, then that individual will hopefully seek to redress his or her injury in court. However, it is not always possible for the courts to hear a case because no individual may have standing, there might be no incentive to sue, or the individual might encounter an immunity defense. For example, it is unclear what party could bring a case against the President if the President refused to prosecute a criminal law on the grounds that he believes the law is unconstitutional.\(^{58}\) Victims that the law seeks to protect would likely not have standing to challenge the presidential non-enforcement because it would be unclear whether the

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\(^{56}\) Chafetz, *supra* note 47; see generally Richard C. Sachs, Cong. Research Serv., RL30548, Hearings in the U.S. Senate: A Guide for Preparation and Procedure 4 (2004), available at http://lieberman.senate.gov/assets/pdf/crs/senatehearings.pdf. There are several types of hearings, but the most germane type of hearing would be an “oversight hearing” to “help ensure that the execution of laws by the executive branch complies with legislative intent, and that administrative policies reflect the public interest.”


\(^{58}\) This situation is distinct from prosecutorial discretion. See *supra* note 39 and accompanying text.
victim could prove causation.\textsuperscript{59} Thus, allowing legislators to challenge presidential non-enforcement will ensure that the constitutional question come before a court.

Forcing the President to address the constitutionality of a law in court is one method to solve the puzzle of presidential non-enforcement for the rule of law. By forcing the constitutional issue in front of the courts, the President and the legislator-plaintiffs strengthen the courts’ legitimacy as independent and nonpartisan arbiters of the law. Moreover, legislator standing ensures that presidential non-enforcement is short-lived because legislator-plaintiffs will have standing to immediately bring the case before a court.\textsuperscript{60} Legislator standing will also diffuse the risk of politician capture because special interest groups will have to invest in hundreds of politicians, not just the President and two political parties. Thus, special interest groups and persons are less incentivized to “purchase” a president because their investment may have limited dividends. Finally, legislator standing will encourage the courts to publicly moot constitutional questions that the political branches disagree about. Open and public discussion about a law’s constitutionality without the risk of arbitrary presidential actions will strengthen the legitimacy of the legal system and reduce the risk of uncertainty about the validity of laws.

1. General Standing Requirements

Article III of the Constitution dictates that federal judicial power extends only to issues arising from “cases” or “controversies.”\textsuperscript{61} In \textit{Lujan v. Defenders of Wildlife},\textsuperscript{62} the Supreme Court

\textsuperscript{59} The victim would still be injured regardless of whether the criminal is criminally prosecuted by the government. Criminal laws certainly seek to deter crimes, but their primary function is to punish crimes after they have occurred. Thus, it is unlikely that the victim could prove that but for the President’s refusal to enforce the law, he would not have been injured. Moreover, while some criminals are forced to provide restitution to their victims, the victims are not guaranteed to receive restitution in all cases. Even if a victim receives restitution, it is unclear whether the victim benefits enough from the restitution to claim that they have been injured if the government does not prosecute the criminal.

\textsuperscript{60} See \textit{Infra} Part IV.

\textsuperscript{61} U.S. CONST. art. 3, § 2. The Court has also enumerated prudential requirements of standing that Congress may override by legislation, such as the “zone of interest” test. See Allen v. Wright, 468 U.S. 737 (1984). However, these prudential standing requirements do not implicate legislator standing.
explained that in order to litigate a “case” or “controversy,” a plaintiff must have standing. One of the irreducible components of standing is an "injury in fact." An injury in fact is a violation against a legally protected interest that is concrete, particularized, and "actual or imminent, rather than hypothetical." Moreover, courts cannot remedy “generalized grievances,” which are injuries that every citizen suffers during the misapplication of the Constitution and laws, because the litigant “is seeking relief that no more directly and tangibly benefits him than it does the public and large.” The Court suggests that generalized grievances are best addressed in the political arena. Thus, the asserted right to have the government act in accordance with the law, or to a particular kind of government conduct, is not a judicially cognizable injury.

2. Raines v. Byrd

The most recent Supreme Court case to address legislator standing is Raines v. Byrd. Raines involved the application of Article III’s standing requirements to federal members of Congress. In Raines, six members of Congress challenged the Line Item Veto Act of 1996 as an unconstitutional expansion of executive power. The Line Item Veto Act authorized the President to eliminate certain provisions in appropriations after the law had been signed into force so long as the cancellation would reduce the federal budget deficit, did not impair any essential government functions, and did not injure the national interest. The litigants claimed that they had suffered a judicially cognizable injury because the Act changed the "legal effect" of their votes on spending bills by "depriving them of the assurance that only the exact bill on

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63 Id.
64 Id. at 573-74.
65 Id.
69 Raines, 504 U.S at 814-15. The Act allowed “any Member of Congress or any individual adversely affected by [this Act] may bring an action . . . for declaratory judgment and injunctive relief on the ground that any provision of this part violates the Constitution.”
which they are voting may become law.” They also argued that the act unconstitutionally infringed upon the separation of powers because the Act did not require the President to exercise the line item veto power prior to the passage of the Act. Thus, Congress had no advance notice on line item vetoes, which threatened legislative compromises.

The Court held that the members of Congress did not have standing to bring the suit. The litigants only had generalized grievances because they did “not claim [to] have been deprived of something to which they are personally entitled . . . [L]oss of political power . . . [does not] make the injury more concrete.” In order to qualify for standing, a legislator must demonstrate loss of a private right. Loss of political power is not a violation of a private right because a congressman’s vote is a vote on behalf of his constituents, not just his own. Thus, loss of political power is merely a generalized grievance, which is insufficient to confer standing.

The Court distinguished the situation in Raines from Powell v. McCormack, where the Court held that a Member of Congress’s constitutional challenge to his exclusion from the House of Representatives had standing to challenge his exclusion. In Powell, the plaintiff had been deprived of a personal, legal entitlement in the form of his consequent loss of salary. Thus, the legislator in Powell had standing as an individual who had suffered a personal injury independent of his role as a legislator. In contrast, the Raines legislators were asserting an institutional injury.

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71 Raines, 504 U.S. at 816.
72 Id.
73 Id. at 821.
74 Id.
as representatives of the house of Congress, and “which necessarily damages all Members of Congress and both Houses of Congress equally.”

The Court also distinguished *Raines* from *Coleman v. Miller*, which outlined the vote nullification exemption to the rule against legislator standing. In *Coleman*, twenty of Kansas’s forty state senators voted not to ratify the proposed “Child Labor Amendment” to the Federal Constitution. However, the state's Lieutenant Governor, the presiding officer of the state Senate, cast a deciding vote in favor of the Amendment, and it was deemed ratified. The state senators claimed that the Lieutenant Governor’s vote was unconstitutional, and thus they suffered an institutional injury of having their votes overridden. The *Coleman* Court held that the state senators had legislator standing to challenge the Lieutenant Governor’s vote in federal court because their votes were “overridden and virtually held for naught.” While the Court never specifically mentions what kind of injury the state senators suffered, the Court states that vote nullification impinged on the senators’ constitutional rights to have their votes “given effect.” Thus, the Court seems to have recognized an institutional injury to legislators qua legislators representing the Kansas state Senate, rather than themselves as individual legislators. In contrast, legislators in *Raines* did not suffer vote nullification because “[t]here were sufficient

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77 Id.
78 307 U.S. 433 (1939). In footnote 8, the Supreme Court notes in dicta that *Coleman* could possibly be distinguished in “other ways,” such as the fact that *Coleman* involved state legislators and thus presented no separation of powers concerns. However, the Court declined to rule on those questions.
80 *Raines*, 504 U.S at 822, quoting *Coleman*, 307 U.S at 436-37 (“However, the State’s Lieutenant Governor, the presiding officer of the State Senate, cast a deciding vote in favor of the amendment, and it was deemed ratified (after the State House of Representatives voted to ratify it).
81 *Coleman*, 307 U.S. at 438.
82 Id.
83 Id. The Court stated that the right of a state senator to have their votes be given effect stemmed from Article V of the Federal Constitution, which guarantees state legislatures the right to ratify federal constitutional amendments. U.S. Const. art. 5 (Federal constitutional amendments can be proposed “on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States . . . .).
votes to pass the bill, and that the bill was nonetheless deemed defeated . . . [t]hey simply lost that vote. In other words, the Raines legislators’ votes on the Line Item Veto Act were given full effect, but they lacked sufficient support from other legislators to prevent the passage of the bill. If Congress did in fact suffer an institutional injury, the ability for legislators to repeal the act or amend the act demonstrates that the legislators can avail themselves to the political process to resolve their concerns.

Although the Supreme Court has not addressed vote nullification since Raines, the D.C. Circuit further defined vote nullification in Campbell v. Clinton. The D.C. Circuit defined “nullify” to “mean treating a vote that did not pass as if it had, or vice versa.” In the case of Campbell, the President’s actions did not nullify a legislative vote.

3. Specific Legislator Injury

The Court in Raines tacitly recognized three types of injuries that can afford a legislator-plaintiff standing: personal injuries incurred as a private individual, institutional injuries caused by vote nullification, and personal injuries caused by vote nullification incurred as a legislator.

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84 Id. at 824.
85 The line-item veto was eventually overturned by the Court in 1998 in Clinton v. City of New York. Clinton v. City of New York, 524 U.S. 417 (1998)
86 Campbell v. Clinton, 203 F.3d 19 (D.C. Cir. 2000). In Campbell, Congressmen challenged President Clinton’s use of military force in Yugoslavia without Congressional approval in violation of the War Powers Resolution. The law requires the President to submit a report within forty-eight hours in any instance where the U.S. Armed Forces are involved in hostilities or even circumstances where hostilities may be imminent. Furthermore, the President is required to terminate all use of the U.S. Armed Forces within sixty days of filing such a report, unless Congress has either declared war or granted specific authorization for the use of force.
87 Id. at 22.
88 Id.at 22-23.
89 In Powell, the Court recognized that the plaintiff-legislator suffered a personal injury qua private individual who was deprived of his personal legal entitlement. Legislators who have their votes nullified or suspended via presidential non-enforcement do not suffer that type of personal injury. Political injuries do not belong to the member of Congress in a private capacity, but rather “claimed injury thus runs (in a sense) with the Member’s seat, a seat which the Member holds . . . as trustee for his constituents.” Raines, 504 U.S at 821
90 In Coleman, the Court recognized an institutional injury when “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.” It is possible that the injury suffered by legislators when the President refuses to enforce a law is institutional. If Congress passed a law, and the President refuses to give effect to either a portion of the law or the law in its entirety, then an individual
I will call this third type of injury “specific legislator injuries.” Existing literature discusses the insufficiencies of the first two grounds for legislator standing in detail. However, the possibility of specific legislator injuries provides a solution to the presidential non-enforcement puzzle for the rule of law.

The Court in Raines tacitly recognized specific legislator injury while discussing Powell. The legislators in Raines did not suffer a cognizable injury in part because they were not “singled out for specially unfavorable treatment as opposed to other Members of their respective bodies,” but rather “a type of institutional injury (the diminution of legislative power), which necessarily damages all Members of Congress and both Houses of Congress equally.” In a footnote, the Court notes the situation where a legislator suffers from “discriminatory” treatment “in the sense that their vote was denied its full validity in relation to the votes of their colleagues.” While the Court did not issue a holding on what situations of unequal treatment would justify legislator standing, the Court seemed to recognize that there are instances where a legislator does not suffer an injury qua private citizen or suffer an injury that is widely held by all legislators in his house of Congress, but still suffers a particularized injury as an individual legislator. In fact, the Powell Court distinguishes the plaintiff-legislator’s private right of action with certain rights that belong

congressman’s vote is at least suspended for the remainder of the term of the non-enforcing President. Congress could try to repeal the law or amend the law, but any Congressional action to reverse the President’s actions would most likely be fruitless because an amendment to the law would probably trigger a veto. Raines, at 823.


92 Id. at 821.
93 Id. at 824, n.7.
to him *qua* legislator, such as procedural rights that other members of the House of Representatives cannot violate prior to expulsion. Violation of those rights grants him sufficient injury to grant standing. Directly addressing whether the case was justiciable, the Court stated:

> [T]he thrust of respondents' argument on this jurisdictional issue is similar to their contentions that this case presents a nonjusticiiable "political question." They urge that it would have been "unthinkable" to the Framers of the Constitution for courts to review the decision of a legislature to exclude a member. However, we have previously determined that a claim alleging that a legislature has abridged an individual's constitutional rights by refusing to seat an elected representative constitutes a "case or controversy" over which federal courts have jurisdiction. See Bond v. Floyd, 385 U.S. 116, 131 (1966).

The *Powell* Court ultimately ruled in favor of the plaintiff-legislator.

In the case of presidential non-enforcement, the specific legislator injury is the suspension of his affirmative vote on an otherwise legitimate law that the President refuses to enforce. The injury is concrete and specific because only legislators who voted in favor of the law would be injured by the non-enforcement. Legislators who voted against the law would not be injured because their votes against the law would not lose any “effect.” Opponents of the law voted against its enactment, and presidential non-enforcement essentially suspends its enactment.

**Conclusion**

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95 *Id.* 507, n.1. 
96 *Id.* 512, n.35.
Presidential non-enforcement still imposes constitutional risks, even with internal and external limitations. A President could claim a constitutional concern as a pretext for a policy-driven order to refuse to enforce a law or as a favor for a financial benefactor. Moreover, even if a legislator is able to sue the President in federal court, the Supreme Court might refuse to adjudicate the underlying constitutional question.\(^9\) In that case, the underlying constitutional question may not be answered. This risk is a serious concern. However, the Court is not violating its constitutional obligations when it refuses to address a constitutional question. In contrast, the President is violating his constitutional obligations if he is forced to enforce a law he believes to be unconstitutional. Given the two choices, the former is preferable. A President’s internal constitutional limitations on the presidential power to refuse to enforce a law and external limitations by legislators to check presidential non-enforcement will allow the President to further the rule of law without violating the Constitution.

\(^9\) For example, the Court to refuse to grant cert or it might refuse to address the constitutional question because of the Ashwander Rules of judicial self-restraint, which counsel the Court to craft their rulings as narrowly as possible. Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936).