

EXECUTIVE NEEDS TO FAITHFULLY OBSERVE AND RE-
SPECT CONGRESSIONAL ENACTMENTS OF THE LAW
ACT OF 2014

MARCH 7, 2014.—Committed to the Committee of the Whole House on the State of
the Union and ordered to be printed

Mr. GOODLATTE, from the Committee on the Judiciary,
submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 4138]

The Committee on the Judiciary, to whom was referred the bill (H.R. 4138) to protect the separation of powers in the Constitution of the United States by ensuring that the President takes care that the laws be faithfully executed, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

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Purpose and Summary

To prevent executive overreach and to ensure that the President discharges his constitutional duty to “take care that the laws be faithfully executed,” the “Executive Needs to Faithfully Observe and Respect Congressional Enactments of the Law (ENFORCE the Law) Act” puts a procedure in place to permit the House of Representatives, or the Senate, to authorize a lawsuit against the Executive Branch for failure to faithfully execute the laws. The legislation also provides for expedited consideration of any such lawsuit, first through a three-judge panel at the Federal district court level and then by providing for direct appeal to the United States Supreme Court. Furthermore, the bill statutorily mandates that the courts set aside their own court-created standing rules and thereby prevents courts from using procedural excuses to avoid making decisions in these important separation of powers cases.

Background and Need for the Legislation

Article II, Section 3, of the U.S. Constitution declares that the President “shall take care that the laws be faithfully executed.” However, President Obama has failed on numerous occasions to enforce Acts of Congress that he disagrees with for policy reasons and has also stretched his regulatory authority to put in place policies that Congress has refused to enact. Although President Obama is not the first president to stretch his powers beyond their constitutional limits, executive overreach has accelerated at an alarming rate under his Administration.

To prevent executive overreach, Representative Trey Gowdy (R-SC), Chairman Darrell Issa (R-CA), and House Judiciary Committee Chairman Bob Goodlatte (R-VA) introduced the “Executive Needs to Faithfully Observe and Respect Congressional Enactments of the Law (ENFORCE the Law) Act” to put a procedure in place to permit the House of Representatives, or the Senate, to authorize a lawsuit against the Executive Branch for failure to faithfully execute the laws. The legislation also provides for expedited consideration of any such lawsuit, first through a three-judge panel at the Federal district court level and then by providing for direct appeal to the United States Supreme Court.

Specifically, the bill provides that if the President, or any other officer or employee of the United States, establishes or implements a formal or informal policy to refrain from enforcing any provision of Federal law, in violation of the requirement that the President “take care that the laws be faithfully executed,” the House or the Senate may, by adoption of a resolution, authorize a civil action to seek declaratory or injunctive relief. Any such lawsuit may be brought by the House, the Senate, or both Houses of Congress jointly.

The bill also provides for special court procedural rules for any case brought by Congress pursuant to the bill. First, the bill provides that any such action shall be filed in a Federal district court of competent jurisdiction and that the district court shall convene a three-judge panel to hear the case. Second, the bill provides that the three-judge panel’s decision is appealable directly to the United States Supreme Court. Finally, the district courts and the Supreme

Court are required to expedite any case filed pursuant to the legislation.

The bill is intended to address procedural hurdles the courts have put in front of previous attempts by individual Members of Congress, and ad hoc groups of Members, to seek judicial review of alleged failures by the President to faithfully execute the law. The courts have held that when Congress, or one House of Congress, suffers an institutional injury, the Congress, or a House of Congress, must authorize any lawsuit aimed at redressing the injury. The ENFORCE the Law Act puts a procedure in place to allow for such authorization, provides for expedited judicial review of these cases, and removes court-created procedural hurdles for deciding these cases.

BACKGROUND

I. THE TAKE CARE CLAUSE

Article II, Section 3, of the Constitution declares that the President “shall take Care that the Laws be faithfully executed.” This clause, known as the Take Care Clause, requires the President to enforce all constitutionally valid Acts of Congress, regardless of his own Administration’s view of their wisdom or policy. The clause imposes a duty on the President; it does not confer a discretionary power. Thus, the Take Care Clause is a limit on the Vesting Clause’s grant to the President of “the executive power.”¹ In other words, while the Vesting Clause gives the President discretion about *how* to enforce the law, the Take Care Clause provides that he has no discretion about *whether* to do so.

Although the Take Care Clause limits the President’s enforcement discretion, it does not require the President to enforce an unconstitutional statute. “The Executive is charged with the faithful execution of ‘the law,’ and an unconstitutional statute is not law.”² Accordingly, in those instances in which the President may lawfully act in contravention of an Act of Congress, “it is the Constitution that dispenses with the operation of the statute. The Executive cannot.”³

The U.S. Court of Appeals for the D.C. Circuit, in a recent opinion striking down the Executive’s assertion of authority to disregard a Federal statute, provided a succinct description of the President’s obligations under the Take Care Clause:

Under Article II of the Constitution and relevant Supreme Court precedents, the President must follow statutory mandates so long as there is appropriated money available and the President has no constitutional objection to the statute. So, too, the President must abide by statutory prohibitions unless the President has a constitutional objection to the prohibition. If the President has a constitutional objection to a statutory mandate or prohibition, the President may decline to follow the law unless and until a final Court order dictates otherwise. But the President

¹U.S. Const. art. II, §1, cl. 1 (“The executive Power shall be vested in a President of the United States of America.”).

²Robert J. Delahunty, “The Obama Administration’s Decisions to Enforce, but Not Defend, DOMA §3,” 106 *Nw. U. L. Rev.* 69 (2011).

³43 Op. Att’y Gen. 275 (1980).

may not decline to follow a statutory mandate or prohibition simply because of policy objections. Of course, if Congress appropriates no money for a statutorily mandated program, the Executive obviously cannot move forward. But absent a lack of funds or a claim of unconstitutionality that has not been rejected by final Court order, the Executive must abide by statutory mandates and prohibitions.⁴

A. *The Original Understanding of the Take Care Clause*

The historical underpinnings of the original understanding of the Take Care Clause predate the American Revolution. The Take Care Clause is best understood “against the historical backdrop with which the Framers were familiar—the four hundred year struggle of the English people to limit the king’s prerogative and achieve a government under law rather than royal fiat.”⁵ During this period, English monarchs asserted a right to dispense with or suspend acts of parliament they disliked.⁶ The English struggle with the royal prerogative was a key grievance that led to the Glorious Revolution and culminated in the Bill of Rights of 1689, which declared, in its very first provision, that “the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of parliament, is illegal.”⁷ The English Bill of Rights became a template for American constitution drafting.⁸

Based on the Framers’ deep-seated fear of the abuse of executive power, and in order to ensure that American presidents could not resurrect anything similar to the king’s prerogative, the Framers made the faithful enforcement of the law a constitutional duty. Thus, “[r]ead in the light of history, the requirement that the President ‘take care that the Laws be faithfully executed’ is a succinct and all-inclusive command through which the Framers sought to prevent the Executive from resorting to the panoply of devices employed by the English kings to evade the will of Parliament.”⁹

Provisions in state constitutions help illuminate the scope of the executive power the Framers’ envisioned granting the President. Thomas Jefferson, in his 1783 *Draft of a Fundamental Constitution for Virginia*, wrote: “[b]y Executive powers, we mean no reference to the powers exercised under our former government by the Crown as of its prerogative. . . . We give them these powers only, which are necessary to execute the laws (and administer the government).”¹⁰ “This understanding of ‘executive power’ and its implementation were reflected in the Virginia Plan, which Edmund Randolph introduced to the Constitutional Convention, and which provided for a ‘national executive . . . with power to carry into execution national laws [and] to appoint officers in cases not otherwise

⁴*In re Aiken County*, 725 F.3d 255, 259 (D.C. Cir. 2013).

⁵Christopher N. May, “Presidential Defiance of ‘Unconstitutional’ Laws: Reviving the Royal Prerogative,” 21 *Hastings Const. L. Q.* 865, 873 (1994).

⁶The power of suspension abrogated a statute across the board; the power of dispensation referred to royally-assigned as-applied exceptions to the rule of law.

⁷W. & M., Sess. 2, c. 2 (1689) (“Act declareing the Rights and Liberties of the Subject and Setleing the Succession of the Crown”).

⁸“Virtually every secular provision in that statute was incorporated into the U.S. Constitution. The prohibition on the suspending and dispensing powers was encoded in Article II’s requirement that the President must ‘take Care that the Laws be faithfully executed.’ Thus, these rejected royal prerogatives were denied to the President.” May, *supra* note 5, at 870–74.

⁹*Id.* at 873.

¹⁰Thomas Jefferson, *Notes on the State of Virginia* 365 (1787).

provided for.”¹¹ In other words, for the Framers’ the “executive power” granted to the President in the Vesting Clause was limited.

As James Madison observed, “[t]he natural province of the executive magistrate is to execute laws, as that of the legislature to make laws. All his acts, therefore, properly executive, must presuppose the existence of the laws to be executed.”¹² James Wilson, later an Associate Justice of the Supreme Court,¹³ explained that the Take Care Clause meant that the President has the “authority, not to make, or alter, or dispense with the laws, but to execute and act the laws, which [are] established.”¹⁴ Because if the President had the authority not only to execute the laws, but also to make, alter, or dispense with the laws, it would have led, according to the Framers’ reasoning, to a dangerous concentration of power in one branch of government. But the Framers sought to avoid such a concentration of power. According to scholars, there was a “fundamental agreement” among the Framers “on the proposition that accumulation of powers and tyranny were inseparable.”¹⁵ This is reflected in Madison’s statement in *Federalist No. 47* that,

No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty than that . . . [t]he accumulation of all powers legislative, executive and judiciary, in the same hands whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.

The Framers’ thus rejected giving the newly created chief executive the legal authority to suspend or dispense with the enforcement of the laws. That is the province of the Congress. As Madison wrote in *Federalist No. 51*, “in republican government, legislative authority necessarily predominates.” Obviously, if the Framers had intended to endow the President with the power to waive, amend, or suspend the laws, it would be in direct conflict with their fear of legislative supremacy.

B. Supreme Court Interpretation of the Take Care Clause

The Supreme Court has rejected the authority of the President to refuse to enforce constitutional laws. This rejection can be seen as early as the Court’s 1803 decision in *Marbury v. Madison*.¹⁶ Although *Marbury* is best known for its discussion of the power of judicial review, the opinion also recognized Congress’s authority to impose specific duties upon Executive Branch officials by law, as well as the official’s corresponding obligation to execute the congressional directive. The Supreme Court more forcefully articulated this principle in an 1838 case, *Kendall v. United States*,¹⁷ involving the Executive Branch’s refusal to comply with an Act of Congress. The Court in *Kendall* observed that “[t]o contend that the obliga-

¹¹ May, *supra* note 5, at 873.

¹² 6 James Madison, *Writings of James Madison* 145 (G. Hunt, ed. 1906).

¹³ James Wilson introduced a draft dealing with the Executive at the Constitutional Convention that read in part: “It shall be his duty to provide for the due & faithful exec—of the laws.” 2 *The Records of the Federal Convention of 1787*, at 171 (Max Farrand ed., 1911).

¹⁴ 2 James Wilson, *Lectures on Law Part 2*, in *Collected Works of James Wilson* 829, 878 (Kermit L. Hall & Mark David Hall eds., 2007).

¹⁵ George W. Carey, *In Defense of the Constitution* 153 (1997).

¹⁶ 5 U.S. (1 Cranch) 137 (1803).

¹⁷ *Kendall v. United States*, 37 U.S. (12 Pet.) 524 (1838).

tion imposed on the President to see the laws faithfully executed implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible.”¹⁸ The Court further noted that permitting Executive Branch non-compliance with the statute “would be vesting in the President a dispensing power, which has no countenance for its support in any part of the constitution; and is asserting a principle, which, if carried out in its results to all cases falling within it, would be clothing the President with a power to control the legislation of congress, and paralyze the administration of justice.”¹⁹

Moreover, a century later, in what has become the seminal case on executive power, *Youngstown Sheet & Tube Co. v. Sawyer*, the Court reasoned that,

In the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. . . . The Constitution does not subject this lawmaking power of Congress to presidential . . . supervision or control. . . . The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times.²⁰

More recently, in *Tennessee Valley Authority v. Hill*, the Court held that it is “the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation. Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws.”²¹ In 1998, the Court further observed, in a case involving the line item veto, that “there is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes.”²² In other words, the “only constitutional power the president has to suspend or repeal statutes is to veto a bill or propose new legislation.”²³

C. Department of Justice Interpretation of the Take Care Clause

Legal opinions from the Justice Department under Presidents Carter, Reagan, George H. W. Bush, Clinton, and George W. Bush all agree that while the President does not have a duty to execute laws that he in good faith determines are unconstitutional, the President may not refuse to enforce an Act of Congress for policy reasons. As Attorney General Civiletti advised during the Carter administration, “[t]he President has no ‘dispensing power,’” meaning that the President and his subordinates “may not lawfully defy an Act of Congress if the Act is constitutional. . . . In those rare instances in which the Executive may lawfully act in contravention

¹⁸*Id.* at 613.

¹⁹*Id.*

²⁰*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

²¹*Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978).

²²*Clinton v. City of New York*, 524 US 417, 438 (1998).

²³Michael W. McConnell, “Obama Suspends the Law,” *Wall St. J.*, July 8, 2013.

of a statute, it is the Constitution that dispenses with the operation of the statute. The Executive cannot.”²⁴ The Department’s Office of Legal Counsel has similarly reasoned that the President’s duty under the Take Care Clause “does not authorize the President to refuse to enforce a statute he opposes for policy reasons.”²⁵

Indeed, other than one decision by President Nixon to refuse to spend money appropriated by Congress, it does not appear that any previous President has claimed the power to negate a law that the President believes is constitutional. Moreover, even with regard to President Nixon’s decision to ignore an Act of Congress, the Office of Legal Counsel rebuffed his assertion of authority. According to Assistant Attorney General Rehnquist, “it seems an anomalous proposition that because the Executive branch is bound to execute the laws, it is free to decline to execute them.”²⁶

D. Prosecutorial Discretion

It has been argued that some of President Obama’s waivers and suspensions of enforcement of Acts of Congress are a proper exercise of prosecutorial discretion. However, there are some fundamental differences between the exercise of prosecutorial discretion and the President’s delay, waiver, or suspension of an Act of Congress.

First, the exercise of prosecutorial discretion ordinarily involves a determination as to whether a *particular* individual or entity should be the subject of an enforcement action for past conduct. With regard, for instance, to the Administration’s immigration non-enforcement directive, Deferred Action for Childhood Arrivals, the Administration has not merely concluded that it should abstain from prosecuting existing offenses, but that no enforcement action will be taken for continuing and future ones. In other words, the beneficiaries of this determination (a determination that is defined on a categorical rather than individual basis) are assured of immunity from legal consequences even though their violations continue. This is not simple prosecutorial discretion, but suspension of the law’s operation with respect to this entire group.

Second, a legitimate exercise of prosecutorial discretion is about setting priorities and allocating resources; it does not challenge and ignore the basic policy judgments Congress made in enacting the law at issue. The President must enforce the law as adopted by Congress and must respect the policy choices Congress has made. Under the Take Care Clause, he may not nullify the law simply because he disagrees with Congress’s choices, or substitute through administrative means his policy preferences for those enacted by Congress. Changes to Federal statutory law must be sought and obtained from Congress. Administratively exempting whole categories of individuals from otherwise applicable law is an impermissible act of suspension.

²⁴ 43 Op. Att’y Gen. 275 (1980).

²⁵ 14 Op. Off. Legal Counsel 37, 51 (1990); *see also* 18 Op. Off. Legal Counsel 199, 200 (Nov. 2, 1994) (stating that “if the president believes that the Court would sustain a particular provision as Constitutional, the President should execute the statute . . . but, if he determines it to be unconstitutional, and the Court would likely agree, he has the authority not to execute the statute”).

²⁶ Memorandum from William H. Rehnquist, Assistant Att’y Gen., Office of Legal Counsel, Re: Presidential Authority to Impound Funds Appropriated for Assistance to Federally Impacted Schools (Dec. 1, 1969).

The President can, of course, establish enforcement priorities because Congress rarely appropriates adequate funds to allow perfect enforcement of any Federal statutory regime. Thus, the President can decide to devote more resources to a particular problem, such as human trafficking or white collar crime, with the inevitable result that other Federal statutes or areas of concern will be less vigorously pursued and enforced. This is entirely lawful and appropriate. Presidents are elected for the very purpose of establishing such priorities.

This authority, however, is not boundless. Although the President can, for example, legitimately decide that, in the post-9/11 environment, most of the Federal Bureau of Investigation's resources should be dedicated to the investigation and prosecution of terrorism cases, he cannot decree that no enforcement assets whatsoever will be allocated to securities fraud or counterfeiting cases. Because the Constitution gives the Executive Branch the exclusive power to enforce Federal laws, this would effectively decriminalize securities fraud and counterfeiting, derogating from the Federal statutes that prescribed such activities.

In short, the President is entitled to establish enforcement priorities, but the ultimate goal must always be implementation of the law enacted by Congress. If the President disagrees with that law, he must convince Congress to change it.

E. Foreign Affairs vs. Domestic Affairs

During the Bush administration the label of "imperial presidency" was a favorite refrain of many of the President's critics. However, while the Bush administration may have had an aggressive reading of executive authority, that reading was limited to an area of core presidential power—foreign affairs.

The Constitution declares that the President is the Commander-in-Chief and that he has the authority to make treaties and to receive foreign ambassadors and other public ministers. Indeed, the Supreme Court has gone as far as to proclaim that the President is the "sole organ of the Federal Government in the field of international relations."²⁷ Accordingly, "if broad executive powers were to exist anywhere, they would exist in foreign affairs, where the limitations of republican government are most pronounced. Furthermore, it is here where the Constitution is most vague, hence giving the President the opportunity to act with the most discretion."²⁸ By contrast, the domestic powers of the Federal Government are strictly defined and limited. "Unlike the 'invitation to struggle' that is the foreign affairs Constitution, the process for enacting legislation is strict and defined."²⁹ In short, Presidential powers are at their weakest in the sphere of domestic policy. Yet this is where President Obama has granted himself unprecedented executive authority.

F. President Obama has Acknowledged His Limited Authority

Even President Obama has acknowledged that action to waive legal requirements put in place by Congress would be outside his

²⁷ United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).

²⁸ Robert J. Delahunty & John C. Yoo, "The Obama Administration, the DREAM Act and the Take Care Clause," 91 *Tex. L. Rev.* 781, 826 (2013).

²⁹ *Id.*

constitutional powers. In a March 2011 Univision Town Hall in Washington, D.C., the President responded to a question regarding whether he would grant “temporary protected status” to undocumented students by stating that,

With 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. . . . Congress passes the law. The executive branch’s job is to enforce and implement those laws. And then the judiciary has to interpret the laws. 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.³⁰

Moreover, in a 2012 interview with Univision, the President responded to a question regarding whether he could halt deportations of illegal immigrants. The President said that he could not “waive away the laws that Congress put in place” and that “the president doesn’t have the authority to simply ignore Congress and say, ‘We’re not going to enforce the laws that you’ve passed.’”³¹

II. THE PRESIDENT’S FAILURES TO FAITHFULLY EXECUTE THE LAWS

Our system of government is a tripartite one, with each branch having certain defined functions delegated to it by the Constitution. The Obama administration, however, has ignored the Constitution’s carefully balanced separation of powers and has unilaterally granted itself the extra-constitutional authority to amend, waive, or suspend the enforcement of the laws. This goes beyond the “executive power” granted to the President and specifically violates the Constitution’s command that the President is to “take care that the laws be faithfully executed.”

The President’s encroachment into the Congress’s sphere of power is not a transgression that should be taken lightly. As English historian Edward Gibbon famously observed regarding the fall of the Roman Empire, “[t]he principles of a free constitution are irrevocably lost, when the legislative power is dominated by the executive.”³² Although the President’s actions have not yet risen to the level of dominating the legislative power, they are certainly undermining the rule of law that is at the center of our constitutional design. From Obamacare to immigration, the current Administration is continually picking and choosing which laws to enforce and which to ignore.

The following are examples of President Obama’s failures to faithfully execute the laws passed by Congress. In none of the below examples has the Administration claimed that the statutory law at issue violates the Constitution or infringes on authorities granted the President in Article II. In fact, with regard to the Affordable Care Act, the Obama administration has argued all the way to the Supreme Court that the Act is constitutional.

³⁰ Jeffrey H. Anderson, “Lawlessness in the Executive,” *The Weekly Standard* (Sept. 2, 2013).

³¹ Lamar Smith, “Obama’s Amnesty for Illegal Immigrants Is Against the Law,” *Christian Sci. Monitor* (June 16, 2012).

³² 1 Edward Gibbon, *The History of the Decline and Fall of the Roman Empire* 54 (1897).

A. Obamacare and the Take Care Clause

1. Illegal Waiver of the Employer Mandate

On July 2, 2013, the Obama administration claimed the authority to delay for 1 year the penalties associated with the Affordable Care Act's employer mandate despite the clear language of the Act. And, on February 10, 2014, the Administration announced that it would further delay the employer mandate for another year for medium-sized employers, those with 50 to 99 employees. Although these delays may be welcome news to employers, who face enormous burdens as a result of the mandate, the unilateral decision to delay implementation of a major provision in the ACA is a serious breach of the President's constitutional duty to ensure that the laws are faithfully executed.

Section 1513 of the ACA imposes penalties on employers who fail to provide "minimum essential coverage" to their employees. The section further provides that these penalties "*shall apply* to months beginning after December 31, 2013."³³ Despite this explicit requirement that the penalties shall apply beginning in 2014, the Administration has announced that the penalties "*will not apply* for 2014" for all employers and will not apply to medium-sized employers for 2015 as well.³⁴ Although the House has acted to delay application of the employer mandate for a year, the Senate has not acted on this legislation.³⁵

The Administration's defense of its claim of authority to delay the employer mandate is unavailing. The ACA gives the Treasury Secretary the authority to collect these penalties "on an annual, monthly, or other periodic basis as the Secretary may prescribe." The Secretary's discretion to prescribe the time at which the affected party must discharge that obligation neither affects the existence of the obligation, nor empowers the Secretary to repeal it. Moreover, the ACA does not allow the Secretary to waive the imposition of such penalties, except in one circumstance unrelated to the Administration's delay.³⁶ In other words, Congress spoke to the question of whether and when the executive should be able to waive the employer mandate, and Congress clearly did not want the Administration to waive the mandate unless certain specified conditions were met.

Some of the President's supporters have claimed the President is not waiving the penalties, only the reporting requirements. This argument, however, is not persuasive. The ACA added two sections to the Internal Revenue Code that require employers to report certain information on their health benefits and the workers who en-

³³ Patient Protection and Affordable Care Act § 1513(d) (emphasis added).

³⁴ Mark J. Mazur, *Continuing to Implement the ACA in a Careful, Thoughtful Manner*, available at <http://www.treasury.gov/connect/blog/pages/continuing-to-implement-the-aca-in-a-careful-thoughtful-manner.aspx> (emphasis added); Juliet Eilperin and Amy Goldstein, "White House delays health insurance mandate for medium-sized employers until 2016," *Wash. Post*, Feb. 10, 2014.

³⁵ See H.R. 2667. Moreover, the Administration has stated that the President will veto H.R. 2667 if the bill is presented to him. Statement of Administration Policy on H.R. 2667 and H.R. 2668 (July 16, 2013) available at http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/113/saphr2667r_20130716.pdf.

³⁶ Section 1332 authorizes the Treasury secretary to waive the employer mandate, but only as part of a state-specific waiver, and only if the state enacts a law that would provide equally comprehensive health insurance to as many residents, and only if that law would impose no additional cost to the Federal Government, and only if there is a "meaningful level of public input" over the waiver and its approval, and even then not until 2017.

roll in that coverage, in order to help the IRS determine whether those workers are eligible for tax credits and whether the employer is subject to penalties. Again, the statute is clear: those reporting requirements take effect in “calendar years beginning after 2013” and “periods beginning after December 31, 2013.” The statute contains no language authorizing the Executive Branch to waive those requirements.

The Obama administration claims it can altogether eliminate the obligation to report the 2014 information: “The Administration . . . will provide an additional year before the ACA mandatory employer and insurer reporting requirements begin.”³⁷ It has no statutory or constitutional authority to do this and, therefore, this delay is illegal.

2. *Illegal IRS Rule to Expand Premium Assistance Subsidies*

The Affordable Care Act provides “premium assistance” tax credits and subsidies to help individuals with incomes within 400 percent of the poverty line purchase qualifying health insurance plans on *state-run* insurance exchanges.³⁸ However, 34 states have decided not to create their own insurance exchanges.³⁹ If a state fails to create an exchange, the ACA authorizes the Federal Government to create a “fallback” exchange for that state. But, under the plain text of the ACA, premium assistance is not available for individuals who purchase insurance in states that have federally established exchanges, because individuals in those states will not have the opportunity to enroll in health insurance “through an Exchange established by the State under section 1311 of the [ACA],” which is the statutory prerequisite to eligibility for premium assistance.⁴⁰

Undaunted by the clear statutory text, the Obama administration issued an Internal Revenue Service rule that purports to extend the ACA’s premium assistance to the purchase of health insurance from federally-run exchanges created in states without exchanges of their own. This rule lacks statutory authority—the ACA precludes the IRS from providing premium assistance for insurance purchased from a federally-run exchange.⁴¹ The text, structure, and history of the ACA show that tax credits and subsidies are not available in federally-run exchanges. The IRS rule is therefore illegal and yet another failure on the Administration’s part to faithfully execute the law. What is more, the rule allows for the distribution of billions of dollars of Federal funds that Congress never authorized.⁴²

Moreover, this illegal IRS rule affects more than just the availability of premium assistance. This is because the availability of premium assistance also operates as the trigger for other mandates and penalties under the ACA. First, the availability of premium as-

³⁷ Mazur, *supra* note 34.

³⁸ 26 U.S.C. § 36B (authorizing subsidies for policies “enrolled in through an Exchange established by the State under section 1311 of the Patient Protection and Affordable Care Act”). These subsidies take the form of refundable tax credits, which are paid directly by the Federal treasury to the taxpayer’s insurer, as an offset against the taxpayer’s premiums.

³⁹ State Decisions For Creating Health Insurance Exchanges, Kaiser State Health Facts, available at <http://kiff.org/health-reform/stateindicator/health-insurance-exchanges/>. Twenty-seven states have opted out of the exchange regime completely, while another seven have opted only to assist the Federal Government with the operation of federally established exchanges.

⁴⁰ 26 U.S.C. § 36B.

⁴¹ *But see Halbig v. Sebelius*, 2014 U.S. Dist. LEXIS 4853 (D.D.C. 2014).

⁴² *Contra* U.S. Const. art. I, § 9 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”).

sistance triggers the individual mandate penalty for many Americans that would otherwise be exempt from the mandate.⁴³ Second, the availability of premium assistance also effectively triggers the enforcement mechanism for the employer mandate.⁴⁴ As a consequence, the employer mandate should be unenforceable in states that decline to create an exchange. In short a state's decision not to create an exchange exempts a substantial portion of its residents and business from Obamacare.

This supposed IRS fix is actually an effort to rewrite the law to provide for the expenditure of billions of taxpayer dollars without Congress's approval.

3. *Illegal Waiver for Non-Compliant Health Plans*

Section 1251 of the Affordable Care Act lists the conditions under which an individual can keep pre-ACA health insurance even if it runs afoul of the ACA's requirements. That section, known as the grandfathering provision, states that "nothing in this Act . . . shall be construed to require that an individual terminate coverage under a group health plan or health insurance coverage in which such individual was enrolled on the date of enactment of this Act."⁴⁵ It further provides that additional family members can be added to "a group health plan or health insurance coverage in which an individual was enrolled on the date of enactment of this Act,"⁴⁶ and that new employees and their families can be added to a group plan "that provide[d] coverage on the date of enactment of this Act."⁴⁷ These are the only three exceptions listed in the statutory text of the ACA that allow for the grandfathering of an existing health care plan.

However, despite the clear language of the ACA, on November 14, 2013, President Obama announced, without statutory authorization, a new grandfathering exception:

Already people who have plans that predate the Affordable Care Act can keep those plans if they haven't changed. That was already in the law. That's what's called a grandfather clause that was included in the law. *Today, we're going to extend that principle both to people whose plans have changed since the law took effect and to people who bought plans since the law took effect.*⁴⁸

The President does not possess the lawful authority to take unilateral action to permit the continued sale of plans that were not in effect on the date of enactment of the ACA. The House passed a bill on November 15, 2013, to allow Americans to keep their existing coverage; however, the Senate has not taken action on that legislation and the President has threatened to veto it.

⁴³ See 26 U.S.C. § 5000A.

⁴⁴ See 26 U.S.C. § 4980H (Employers must make an "assessable payment" if they do not offer their employees the opportunity to enroll in employer-sponsored health coverage, but that payment is only triggered if at least one employee enrolls in a plan from *state-run* exchange.).

⁴⁵ 42 U.S.C. § 18011.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ "President Obama Announces New Steps to Help Americans Receiving Insurance Cancellation Notices," available at <http://www.whitehouse.gov/blog/2013/11/14/president-obama-announces-new-steps-help-americans-receiving-insurance-cancellation> (emphasis added).

4. *Illegal Contraceptive Mandate*

The Affordable Care Act requires employers to provide certain “preventive services” at no-cost to the insured. In carrying out this requirement the Department of Health and Human Services (HHS) has mandated that employers, including religiously-affiliated institutions, pay for sterilization, abortion-inducing drugs, and birth control services even if paying for them violates the employers’ conscience rights.

However, this regulatory mandate violates an Act of Congress: the Religious Freedom Restoration Act (RFRA). RFRA provides that the Federal Government may “substantially burden” a person’s “exercise of religion” only if it demonstrates that application of the burden to the person “is in furtherance of a compelling governmental interest” and “is the least restrictive means of furthering” that interest.⁴⁹ Yet in issuing the contraceptive mandate, HHS never even attempted to structure the requirements in such a way as to eliminate the burden on religious employers. The President has a constitutional duty to ensure that RFRA is faithfully executed even if it interferes with his policy preferences regarding contraceptives.

B. *Immigration Non-Enforcement and the Take Care Clause*

1. *Deferred Action for Childhood Arrivals*

Article I, Section 8 of the Constitution gives Congress, not the President, the authority “to establish a uniform rule of naturalization.” “Although the Constitution is silent on border control and immigration, the Supreme Court declared long ago that these authorities reside with Congress.”⁵⁰ While the Supreme Court has indicated on several occasions that the President has some measure of “inherent” power over immigration,⁵¹ the Court seems to have settled finally on the view that the formation of immigration policy “is entrusted exclusively to Congress,”⁵² and that “[t]he plenary authority of Congress over aliens . . . is not open to question.”⁵³ Congress has passed an extensive Immigration and Naturalization Act, which specifies the limited cases in which the Executive Branch can suspend the removal of illegal aliens. The Act does not give the President the authority to interrupt the deportation of whole classes of illegal aliens.

The Administration has stated that going forward deportation efforts will be focused solely on aliens with criminal records and no enforcement resources will be expended on other types of cases. Undocumented individuals who have avoided apprehension at the border and have not been convicted of a serious offense since arriving to the United States will no longer face the prospect of deportation, the most basic means of immigration enforcement.

Far from merely prioritizing the use of limited resources, the Administration’s policy effectively rewrites the law. It means that the vast majority of undocumented aliens no longer need to fear immigration enforcement. This applies even to those aliens who are now

⁴⁹ 42 U.S.C. § 2000bb-1.

⁵⁰ John Yoo, “Obama Has Pursued a Dangerous Change in the Powers of the President,” *FoxNews.com*, October 12, 2012.

⁵¹ *See, e.g.*, *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950).

⁵² *Galvan v. Press*, 347 U.S. 522, 531 (1954).

⁵³ *INS v. Chadha*, 462 U.S. 919, 940-41 (1983).

in deportation proceedings. Limiting the possibility of deportation in this manner eliminates entirely any deterrent effect the immigration laws have, and also states plainly that those laws can be ignored with impunity. The President has, in effect, suspended operation of those laws with respect to a very large and identifiable class of offenders. This clearly exceeds his constitutional authority.

2. Non-enforcement of Immigration Laws for Parents and Guardians

On August 23, 2013, the Obama administration issued a policy directive instructing Immigration and Customs Enforcement officials not to enforce immigration laws in cases in which the unlawful immigrant is the primary provider for a minor child, regardless of the child's immigration status, or in which the unlawful immigrant is the parent or legal guardian of a child who is a U.S. citizen or lawful permanent resident. This is yet another example of President Obama abusing his authority and unilaterally refusing to enforce the current immigration laws by directing ICE officials to stop removing broad categories of unlawful immigrants.

Instead of working with Congress to address problems with the country's immigration system, the President has once again decided to go it alone despite the fact that both the House and the Senate are working on immigration reform measures. This is another example of the President's contempt for the rule of law and a failure to faithfully execute the laws passed by Congress.

3. Unlawful Extension of Parole in Place

On November 15, 2013, U.S. Citizenship and Immigration Services (USCIS) issued a policy memorandum providing that spouses, children, and parents of those who are serving—or who have previously served—in the Armed Forces of the United States could receive “parole-in-place” on a categorical basis. The policy allows aliens who entered the United States without inspection—and who are family members of current or former service members—to apply for and receive “parole” that would permit them to remain in the country and apply for green cards. This will permit many aliens to adjust status without having to travel abroad for consular processing of their immigrant visas (and likely trigger the 3 or 10 year inadmissibility bars).

Notably, the parole statute, the regulations, and the legislative history do not seem to contemplate parole for: (1) aliens who are already in the United States illegally, (2) an entire category of people, or (3) an indefinite period of time. Parole was created to permit aliens to enter the United States temporarily, on a case-by-case basis, for urgent or humanitarian reasons.

C. Non-Enforcement of Federal Criminal Law and the Take Care Clause

1. Non-enforcement of the Controlled Substances Act for Medical and Recreational Marijuana

The Controlled Substances Act (CSA) prohibits the possession, growth, and distribution of marijuana.⁵⁴ The CSA does not distinguish between purposes or different uses of marijuana; it clearly

⁵⁴ Controlled Substances Act, 21 U.S.C. §§ 841, 844 (2006).

states that all use and distribution is illegal.⁵⁵ The administrations of both President George W. Bush and President Bill Clinton enforced the CSA and prosecuted medical marijuana suppliers.⁵⁶ Moreover, in 2005, the Supreme Court held that the CSA did not make exceptions for any intrastate sales, including cases of small-scale production and use of medical marijuana.⁵⁷

However, Attorney General Holder announced on October 19, 2009, that the Justice Department would stop enforcing the Federal marijuana ban against persons who comply with state medical marijuana laws. Although the memo recognized Congress's inclusion of marijuana as a dangerous drug and serious crime in the CSA, the Department proclaimed that enforcement of the CSA with regard to medical marijuana is unnecessary for "individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."⁵⁸ As of September 2013, 20 states and the District of Columbia have legalized medical marijuana.⁵⁹

Additionally, on August 29, 2013, Attorney General Holder announced that the Justice Department would not enforce the CSA against companies—even large companies—that produce and distribute marijuana as a recreational drug as long as those companies operated within a "strong and effective" state regulatory system (and also meet eight other criteria).⁶⁰ Starting in January 2014, two states—Colorado and Washington—will allow large-scale, for-profit production and distribution of marijuana for recreational (non-medical) use.

The decision of the Obama administration not to enforce the CSA in entire states is not a valid exercise of prosecutorial discretion. A decision by an individual Federal prosecutor not to bring charges against an individual for violating the CSA's prohibitions on the production, possession, or distribution of marijuana likely falls within the umbrella of "prosecutorial discretion." Thus, there would appear to be no constitutional defect in a prosecutor's decision not to prosecute a specific individual whose use of marijuana is in compliance with state law. The Executive Branch has no obligation to prosecute all violations of Federal law.

However, the breadth of the Justice Department's position on marijuana non-enforcement goes well beyond the limits of prosecutorial discretion. Rather, the guidance to U.S. Attorneys establishes a formal, department-wide policy of selective non-enforcement of an Act of Congress. This infringes on Congress's lawmaking authority by, in effect, amending the flat prohibitions of the CSA to permit the possession, distribution, and cultivation of marijuana so long as

⁵⁵ *Id.*

⁵⁶ Robert A. Mikos, *A Critical Appraisal of the Department of Justice's New Approach to Medical Marijuana*, 22 *Stan. L. & Pol'y Rev.* 633, 638 (2011).

⁵⁷ *Gonzales v. Raich*, 545 U.S. 1 (2005) (challenging the CSA's application to a small-scale grower and medical marijuana user).

⁵⁸ Memorandum from David W. Ogden, Deputy Att'y Gen., U.S. Dep't of Justice, to Selected U.S. Att'ys (Oct. 19, 2009), available at <http://blogs.justice.gov/main/archives/192>.

⁵⁹ *20 Legal Medical Marijuana States and DC*, PROCON.ORG, available at <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881> (including California (in 1996); Oregon (1998); Washington (1998); Alaska (1999); Maine (1999); Colorado (2000); Hawaii (2000); Montana (2004); Nevada (2004); Vermont (2004); Rhode Island (2006); New Mexico (2007); Michigan (2008); New Jersey (2009); Arizona (2010); DC (2010); Delaware (2011); Connecticut (2012); Massachusetts (2012); Illinois (2013); New Hampshire (2013)).

⁶⁰ Memorandum from David W. Ogden, Deputy Att'y Gen., U.S. Dep't of Justice, to All U.S. Att'ys (Aug. 29, 2003), available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

that conduct is in compliance with state law. This crosses the line between permissible discretionary decisions made by prosecutors on a case-by-case basis and an impermissible suspension of the law by executive fiat.

2. *Amending Statutory Mandatory Minimums by Executive Decree*

On August 12, 2013, Attorney General Holder announced in a speech to the American Bar Association changes in Federal mandatory sentencing policy regarding low-level, non-violent drug offenders. Attorney General Holder's announcement continues the Obama administration's pattern of overstepping its constitutional bounds by selectively enforcing Federal law and attempting to amend Acts of Congress through executive fiat in blatant disregard for the limitations the Constitution places on the Executive Branch. The Obama administration cannot unilaterally ignore the laws or the limits on the President's powers. While the Executive Branch has the ability to use prosecutorial discretion in individual cases, that authority does not extend to entire categories of people.

Although Members of Congress may agree with many of the policy issues Attorney General Holder outlined in his announcement, reform regarding mandatory minimums is constitutionally required to come from Congress. And Congress is working on the issue. The House Judiciary Committee created the Overcriminalization Task Force to address these issues as well as others with the Federal criminal justice system. This Task Force is in the process of taking a broad look at the Federal criminal code, allowing for input from experts, and is already considering sentencing and prison reform issues. If the Obama administration wants to reform our criminal justice system, it is constitutionally required to work with Congress to do so.

D. *Other Failures to Faithfully Execute the Laws*

1. *Illegally Amending No Child Left Behind Through Executive Waivers*

In 2001, Congress enacted the No Child Left Behind (NCLB) education reforms. The legislation imposed numerous requirements on states and local school districts that receive Federal funds. While there is bipartisan agreement that the law needs to be reformed, rather than working with Congress to reform the law, the Obama administration has used the promise of waivers from the requirements of NCLB to compel states to adopt the Administration's own version of education reform policies.

The Administration's proposals have not been considered by Congress, let alone enacted into law, but by attaching strings to the 35 state waivers that have thus far been granted, the Administration is effectively implementing a new law without bothering to go to Congress. As the *New York Times* described it: "In the heat of an election year, the Obama administration has maneuvered around Congress, using the waivers to advance its own education agenda. . . . The waivers appear to follow an increasingly deliberate pattern by the administration to circumvent lawmakers."⁶¹

⁶¹Motoko Rich, "No Child' Law Whittled Down by White House," *N.Y. Times*, July 6, 2012.

2. *Illegally Amending the 1996 Welfare Reform Law Through Waivers*

In July 2012, despite the plain meaning of the law, the Obama administration asserted that it had the authority to waive the statutory work requirements included in the bipartisan 1996 welfare reform law. The non-partisan Government Accountability Office (GAO) has determined that the Obama administration's decision to unilaterally grant itself the authority to waive Federal Temporary Assistance for Needy Families (TANF) work requirements, which were a critical element of the welfare reform enacted in 1996, qualifies as a rule.⁶² As such, the waiver must be submitted to Congress and is subject to review—and potential disapproval—under the Congressional Review Act.

Despite the Obama administration's attempts to unilaterally undo welfare work requirements, the GAO analysis is unequivocal that any changes must be submitted to Congress. Circumventing Congress is a flagrant abuse of our system of separated powers. Work requirements were a critical part of the landmark 1996 Welfare Reform law and cannot constitutionally be scrapped through executive decree by the Obama administration.

3. *Illegally Ignoring Advise & Consent ("Recess" Appointments)*

One of the checks and balances imposed by the Founding Fathers was the requirement that senior Executive Branch officials be appointed only with the consent of the Senate. In the modern regulatory state the approval of officials by the Senate is one key way to ensure that regulators do not abuse their authority. In order to address situations in which the Senate was in recess, thus preventing the Senate from consenting, the Framers provided for a limited interim appointment process absent Senate confirmation.

When the Senate did not approve four of his nominees to two regulatory agencies—the head of the new Consumer Financial Protection Bureau (CFPB) and three members of the National Labor Relations Board (NLRB)—President Obama took the unprecedented step of declaring that the Senate was in recess—even though it was not—and invoking his interim appointments power. Seating the head of the CFPB and a quorum for the NLRB allowed both agencies to begin promulgating regulations that would have otherwise been on hold until the President and the Senate came to agreement on filling the vacancies.

On January 25, 2013, the U.S. Court of Appeals for the D.C. Circuit held that President Obama exceeded his constitutional authority by making "recess" appointments to the National Labor Relations Board.⁶³ According to the court, the appointments were unconstitutional because (1) they were not made during "the Recess" of the Senate (that is, the intersession recess between the first and second Senate sessions), and (2) the vacancies the appointments filled did not arise during the intersession recess.

⁶² Letter from Lynn H. Gibson, General Counsel, General Accountability Office, to Sen. Orrin Hatch and Rep. Dave Camp (Sept. 4, 2012) available at http://waysandmeans.house.gov/uploadedfiles/gao_tanf_report_sept_2012.pdf.

⁶³ Noel Canning v. NLRB, 705 F.3d 490 (D.C. Cir. 2013).

III. THE DOCTRINE OF STANDING

“Federal courts are courts of limited jurisdiction[, possessing] only that power authorized by Constitution and statute.”⁶⁴ The “judicial power” conferred on Article III courts by the Constitution is limited to deciding particular “Cases” and “Controversies.”⁶⁵ “In an attempt to give meaning to Article III’s case-or-controversy requirement, the courts have developed a series of principles termed ‘justiciability doctrines,’ among which [is] standing.”⁶⁶ In other words, “‘Article III standing . . . enforces the Constitution’s case-or-controversy requirement.’”⁶⁷

Standing is “an essential and unchanging’ predicate to any exercise of jurisdiction” by an Article III Federal court.⁶⁸ Thus, standing is a threshold procedural question that does not turn on the merits of a plaintiff’s complaint, but rather on whether the particular plaintiff has a legal right to a judicial determination on the issues before the court. The doctrine of standing is made up of both constitutional requirements and prudential considerations. “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.’”⁶⁹

In order to satisfy the constitutional standing requirements, the Supreme Court has imposed three requirements. “First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical.”⁷⁰ “Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court.”⁷¹ “Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.”⁷²

The Supreme Court has stressed that the standing inquiry is “especially rigorous” in cases in which important separation of powers concerns are implicated by a dispute.⁷³ In the separation of powers context, the courts have required plaintiffs to demonstrate that “the dispute is ‘traditionally thought to be capable of resolution through the judicial process.’”⁷⁴

In addition to constitutional standing requirements, Federal courts also follow a set of prudential standing principles. Similar to the constitutional requirements, these prudential limits are “founded in concern about the proper—and properly limited—role of the courts in a democratic society”; however, these standing prin-

⁶⁴ *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

⁶⁵ U. S. Const., Art. III, § 2.

⁶⁶ *Allen v. Wright*, 468 U.S. 737, 750 (1984).

⁶⁷ *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006) (quoting *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 11 (2004)).

⁶⁸ See *Am. Chemistry Council v. Dep’t of Transp.*, 468 F.3d 810, 814 (D.C. Cir. 2006) (quoting *Florida Audubon Soc. v. Bentsen*, 94 F.3d 658, 663 (D.C. Cir. 1996)).

⁶⁹ *United States v. Windsor*, 133 S. Ct. 2675, 2685 (2013) (quoting *Elk Grove Unified School Dist.*, 542 U.S. 11–12) (internal citations omitted).

⁷⁰ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotations and citations omitted).

⁷¹ *Id.* (internal quotations and alterations omitted).

⁷² *Id.*

⁷³ See *Raines v. Byrd*, 521 U.S. 811, 819–20 (1997).

⁷⁴ *Id.* at 819 (quoting *Flast v. Cohen*, 392 U.S. 83, 97 (1968)).

ciples are judicially created. Unlike their constitutional counterparts, prudential standing principles “can be modified or abrogated by Congress.”⁷⁵ Accordingly, prudential standing principles are more flexible “rule[s] . . . of Federal appellate practice,”⁷⁶ designed to protect the courts from “decid[ing] abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.”⁷⁷

A. Individual Member of Congress Standing

The courts have been increasingly skeptical, especially since *Raines v. Byrd*, of finding standing in cases brought by individual Members of Congress or ad hoc groups of Members. Courts have rejected Member standing in many of these cases, in part, because the Members bringing the suit were not singled out for especially unfavorable treatment as opposed to other Members of Congress. Rather, their claims were based on institutional injuries (generally the diminution of legislative power), which necessarily damage all Members of Congress equally.

Moreover, in these cases Members have not claimed that they have been deprived of something to which they personally are entitled—such as their seats as Members of Congress after their constituents had elected them.⁷⁸ Instead, their claims have been based on a loss of political power, not loss of any private right, which would make the injury more concrete. As one Federal district court judge recently observed, the Supreme Court’s legislative standing jurisprudence “teaches that generalized injuries that affect all Members of Congress in the same broad and undifferentiated manner are not sufficiently ‘personal’ or ‘particularized,’ but rather are institutional, and too widely dispersed to confer standing.”⁷⁹

B. Institutional Standing

While Members of Congress often have difficulty establishing standing to allege an institutional injury, institutional plaintiffs (e.g., a House committee when authorized by the full House to bring suit) have been more successful at establishing standing in cases in which they have been authorized to seek judicial recourse on behalf of one House of Congress. However, all of the available cases regarding institutional standing have dealt with judicial enforcement of a subpoena. It is unclear how, or if, these precedents would be applied outside of the subpoena enforcement context.

It is clear though that *Raines v. Byrd*, the leading legislative standing case, “does not stand for the proposition that Congress can never assert its institutional interests in court.”⁸⁰ In fact, the

⁷⁵ *Bennett v. Spear*, 520 U.S. 154, 162 (1997). These prudential principles require that (1) the plaintiff assert his own legal rights and interests, rather than those of a third party; (2) the plaintiff’s complaint fall within the “zone of interests” protected or regulated by the statute or constitutional guarantee in question; and (3) the plaintiff not assert “abstract questions of wide public significance which amount to generalized grievances pervasively shared and most appropriately addressed in the representative branches.”

⁷⁶ *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 333 (1980).

⁷⁷ *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

⁷⁸ *But see Powell v. McCormack*, 395 U.S. 486 (1969).

⁷⁹ *Kucinich v. Bush*, 236 F. Supp. 2d 1, 7 (D.D.C. 2002).

⁸⁰ *Comm. on Oversight & Gov’t Reform v. Holder*, 2013 U.S. Dist. LEXIS 140994 at *34 (D.D.C. 2013).

Supreme Court noted in *Raines* that it “attach[ed] some importance to the fact that [plaintiffs] have not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose their suits.”⁸¹ In other words, the Supreme Court’s decision in *Raines* was premised in part on the fact that the Members in that case did not initiate the lawsuit on behalf of their respective House of Congress.

DISCUSSION

In order to rein in the President’s failure to faithfully execute the laws, the ENFORCE the Law Act puts a procedure in place to permit the House, or the Senate, to authorize a lawsuit against the Executive Branch. One hurdle the House or the Senate would face in any such lawsuit is establishing standing to sue. The Federal courts have been very resistant to find that legislators have standing to bring suit. However, this does not mean that a legal challenge brought by one House of Congress based on the failure to faithfully execute the laws is necessarily foreclosed.

Although the cases in the leading line of legislative standing cases all found that the Members of Congress bringing lawsuits did not have standing to sue, in none of those cases was the lawsuit brought pursuant to the authorization of one House of Congress to redress a clearly delineated, concrete injury to the institution.⁸² Rather, in those cases individual Members sought to ameliorate Congress’s institutional injury without the consent of the institution itself. But the Court has never held that an institution, such as the House of Representatives, cannot file suit to address an institutional harm. As one Federal district court judge recently pointed out regarding the seminal case on legislative standing, *Raines v. Byrd*, “the Supreme Court’s decision in *Raines* was premised in part on the fact that the legislators in that case did not initiate their lawsuit on behalf of their respective legislative bodies.”⁸³

There is a separate line of cases, however, involving enforcement of congressional subpoenas in which the Federal courts in the D.C. Circuit have found that a House of Congress has standing to defend its institutional interests.⁸⁴ In this line of cases, the plaintiff was authorized to act on behalf of the House or Senate to vindicate the House’s, or the Senate’s, institutional interest that had been challenged by the Executive Branch. This line of cases is clearly distinguishable from the *Raines* line of cases. In fact, in *Raines*, the Supreme Court even noted that it “attach[ed] some importance to the fact that [plaintiffs] have not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose their suits.”⁸⁵ Indeed, “the *Raines* case was dismissed because the individual lawmakers who brought the action failed to allege the requisite particularized and concrete injury to themselves, not because a legislative body as an institution

⁸¹ *Raines*, 521 U.S. at 829.

⁸² See, e.g., *Raines v. Byrd*, 521 U.S. 811 (1997); *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 1999); *Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999).

⁸³ *Kucinich v. Obama*, 821 F. Supp. 2d 110, 120 (D.D.C. 2011).

⁸⁴ See, e.g., *United States v. AT&T*, 551 F.2d 384 (D.C. Cir. 1976); *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008); *Comm. on Oversight & Gov’t Reform v. Holder*, 2013 U.S. Dist. LEXIS 140994 (D.D.C. 2013); *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 366 F. Supp. 51 (D.D.C. 1973).

⁸⁵ *Raines*, 521 U.S. at 829.

would lack standing to bring an action on its own behalf.”⁸⁶ Thus, authorization by a House of Congress is a “key factor” in the standing calculus in institutional injury cases: “the fact that the House . . . explicitly authorized this suit does more than simply remove any doubt that [the House] considers itself aggrieved. It is a key factor that moves this case from the impermissible category of individual plaintiff asserting an institutional injury to the permissible category of an institutional plaintiff asserting an institutional injury.”⁸⁷

The ENFORCE the Law Act provides for lawsuits brought pursuant to authorization by one House of Congress. It would appear, therefore, that this second line of cases is more applicable to standing in the lawsuits contemplated by this legislation.

In addition to institutional authorization to bring suit, there is another factor that distinguishes the *Raines* line of cases from the cases contemplated by the ENFORCE the Law Act. In *Raines*, the asserted injury was to Congress’s vaguely defined “political power” that would be lost as a result of the President’s use of the line item veto. The harm alleged was not tied to a specific instance of a loss in voting power; rather, the Members asserted that they could be injured in the future as a result of the line item veto. By contrast, with regard to the President’s failure to faithfully execute the laws, the injury is not some future hypothetical—the President is currently refusing to enforce clear provisions in statutes passed by Congress. Accordingly, a suit brought to challenge a failure to faithfully execute the laws would be based on an injury to the House or Senate caused by the President’s failure to enforce a particular statutory provision. As has been observed, “it is clear that the action in *Raines* was dismissed for lack of jurisdiction because of the ‘amorphous’ nature of the claim, not because it was an inter-branch dispute.”⁸⁸ Or as the *Raines* court put it, “[t]here is a vast difference between the level of vote nullification at issue in *Coleman v. Miller*[, a case in which the Court determined the legislators had standing,] and the abstract dilution of institutional legislative power that is alleged here.”⁸⁹

The institutional injuries that could be alleged in light of the Obama administration’s failures to faithfully execute the laws appear to rise to the “level of vote nullification at issue in *Coleman*.” This is because in *Raines*, the Court characterized *Coleman* as holding that “legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.”⁹⁰ In other words, because many of the Obama administration’s actions have effectively nullified Acts of Congress, according to *Raines* and *Coleman* there is “institutional injury” sufficient to satisfy Article III standing. For example, in the Affordable Care Act, Congress passed language that stated that the employers who fail to provide “minimum essential coverage” to their employees are subject to a penalty that “*shall apply* to months beginning after De-

⁸⁶ *Comm. on Oversight & Gov’t Reform*, 2013 U.S. Dist. LEXIS 140994 at *55.

⁸⁷ *Miers*, 558 F. Supp.2d at 71.

⁸⁸ *Comm. on Oversight & Gov’t Reform.*, 2013 U.S. Dist. LEXIS 140994 at *33.

⁸⁹ *Raines*, 521 U.S. at 826.

⁹⁰ *Id.* at 823.

ember 31, 2013.”⁹¹ The Obama administration, however, has, without statutory authorization, issued two 1-year delays to all, or part, of this mandate. This was a nullification of an Act of Congress that should be sufficient to confer Article III standing.

Thus, the nullification of a legislative act, such as delaying the employer mandate, provides an institutional injury sufficient to qualify as an Article III case or controversy. If Congress explicitly authorizes an institutional lawsuit to enforce the nullified law, Congress, or a House of Congress, as an institution, should have standing to bring a lawsuit—“[s]o long as the courts are convinced that the legislator-plaintiffs are speaking on behalf of the institution (the ‘institutional check’) and the Executive’s act is tantamount to a ‘nullification’ of legislative action (the ‘injury check’), the controversy will be sufficiently direct and concrete to satisfy Article III injury-in-fact requirements.”⁹²

Moreover, there are factors present in the situation created by President Obama’s repeated failures to faithfully execute the laws that were not present in *Raines*. The Supreme Court in *Raines* was careful to note that,

our conclusion neither deprives Members of Congress of an adequate remedy (since they may repeal the Act or exempt appropriations bills from its reach), nor forecloses the Act from constitutional challenge (by someone who suffers judicially cognizable injury as a result of the Act). Whether the case would be different if any of these circumstances were different we need not now decide.⁹³

The current circumstances related to President Obama’s failure to faithfully execute the laws are different than the circumstances present in *Raines*. First, because the President is ignoring statutory provisions that restrict his authority, it is not a real option for Congress to pass more legislation to remedy the situation. The separation of powers cannot be preserved by Congress passing new legislation that effectively says, “we really mean it this time,” in all the areas in which the President is failing to faithfully execute the law. Accordingly, without judicial review there is effectively no way for Congress to defend the separation of powers.

Second, there are no other plaintiffs to bring a constitutional challenge to many of the Obama administration’s lawless actions. This is because these actions by the President are “benevolent” suspensions of the law, in which whole classes of people are exempted from the requirements of Federal law. As David Rivkin and Elizabeth Price Foley have observed, “[n]o one person was sufficiently harmed to create standing to sue, for instance, when Obama instructed the Department of Homeland Security to stop deporting young illegal immigrants. Indeed, these actions have helped, rather than harmed them.”⁹⁴ In other words, unlike *Raines*, where other plaintiffs were available to challenge the constitutionality of the line item veto (and did so in *Clinton v. City of New York*),⁹⁵ if legis-

⁹¹ Patient Protection and Affordable Care Act § 1513(d) (emphasis added).

⁹² *Enforcing the President’s Constitutional Duty to Faithfully Execute the Laws: Hearing Before the House Committee on the Judiciary*, 113th Cong. (2014) (statement of Elizabeth Price Foley).

⁹³ *Raines*, 521 U.S. at 829–30 (internal footnotes and citations omitted).

⁹⁴ David Rivkin & Elizabeth Price Foley, “Can Obama’s Legal End-Run Around Congress Be Stopped?,” *Politico* (Jan. 15, 2014).

⁹⁵ 524 U.S. 417 (1998).

lative standing were denied to challenge President Obama's usurpations of Congress's authority, there will be no other way to check the President.

It is also important to note that there is nothing unusual or inappropriate about courts weighing in on separation of powers disputes. "Our system of government requires that Federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility."⁹⁶ Moreover, deciding "whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution."⁹⁷ The courts have a long history of resolving cases involving the allocation of power between the political branches and addressing important separation of powers concerns: *Morrison v. Olson*, 487 U.S. 654 (1988) (removal of appointed officials); *Bowsher v. Synar*, 478 U.S. 714 (1986) (execution of the laws); *INS v. Chadha*, 462 U.S. 919 (1983) (legislative veto); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (removal of appointed officials); *Myers v. United States*, 272 U.S. 52 (1926) (removal of appointed officials).

Congress can help itself overcome the standing issues that have prevented judicial review in the *Raines* line of cases. Congress can do this by passing the ENFORCE the Law Act to put a procedure in place for authorizing the House, or the Senate, to seek judicial review of instances in which either body has determined that the President has failed to faithfully execute the laws. The ENFORCE the Law Act will ensure that the courts do not apply prudential standing principles to avoid judicial review—prudential standing principles "can be modified or abrogated by Congress."⁹⁸ It will also ensure that cases alleging institutional injuries can be brought on behalf of the institution rather than by ad hoc groups of individual Members of Congress. In other words, putting a congressional lawsuit authorization procedure in place as part of statutory law should bolster the House's, or the Senate's, standing in court.

In addition, by providing for legislative standing statutorily, Congress can provide for special court procedural rules, including expedited review, for cases brought pursuant to the legislation. These special procedural rules can significantly increase the speed by which a case challenging the President's failure to faithfully execute the law makes its way through the courts. The court procedural rules in the ENFORCE the Law Act are similar to those in the Line Item Veto Act. Litigation challenging the constitutionality of the line item veto made it through the district court and was decided by the Supreme Court within 7 months of the Act's effective date.⁹⁹

⁹⁶ *Powell v. McCormack*, 395 U.S. 486, 549 (1969).

⁹⁷ *Baker v. Carr*, 369 U.S. 186, 211 (1962).

⁹⁸ *Bennett v. Spear*, 520 U.S. 154, 162 (1997).

⁹⁹ See *Raines*, 521 U.S. 811.

Hearings

The Committee on the Judiciary held no hearings on H.R. 4138.

Committee Consideration

On March 5, 2014, the Committee met in open session and ordered the bill H.R. 4138 favorably reported, without amendment, by a rollcall vote of 18 to 14, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following rollcall votes occurred during the Committee's consideration of H.R. 4138.

1. An amendment by Mr. Conyers to provide that nothing in the Act would limit or otherwise affect any action taken by the President, the head of a department or agency of the United States, or any other officer or employee of the United States in order to combat discrimination and protect the civil rights of the people of the United States. Defeated by a rollcall vote of 11 to 16.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)			
Mr. Coble (NC)		X	
Mr. Smith (TX)			
Mr. Chabot (OH)			
Mr. Bachus (AL)		X	
Mr. Issa (CA)			
Mr. Forbes (VA)		X	
Mr. King (IA)		X	
Mr. Franks (AZ)			
Mr. Gohmert (TX)		X	
Mr. Jordan (OH)		X	
Mr. Poe (TX)		X	
Mr. Chaffetz (UT)			
Mr. Marino (PA)		X	
Mr. Gowdy (SC)		X	
Mr. Labrador (ID)		X	
Ms. Farenthold (TX)		X	
Mr. Holding (NC)		X	
Mr. Collins (GA)		X	
Mr. DeSantis (FL)		X	
Mr. Smith (MO)		X	
[Vacant]			
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)	X		
Mr. Scott (VA)	X		
Ms. Lofgren (CA)	X		
Ms. Jackson Lee (TX)	X		
Mr. Cohen (TN)			

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)	X		
Ms. Chu (CA)			
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)	X		
Mr. Garcia (FL)	X		
Mr. Jeffries (NY)	X		
Mr. Cicilline (RI)	X		
Total	11	16	

2. An amendment by Mr. Nadler to provide that nothing in the Act would limit or otherwise affect the constitutional authority of the executive branch to exercise prosecutorial discretion. Defeated by a rollcall vote of 11 to 17.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)			
Mr. Coble (NC)		X	
Mr. Smith (TX)		X	
Mr. Chabot (OH)		X	
Mr. Bachus (AL)		X	
Mr. Issa (CA)		X	
Mr. Forbes (VA)		X	
Mr. King (IA)		X	
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)			
Mr. Jordan (OH)		X	
Mr. Poe (TX)			
Mr. Chaffetz (UT)			
Mr. Marino (PA)			
Mr. Gowdy (SC)		X	
Mr. Labrador (ID)		X	
Ms. Farenthold (TX)		X	
Mr. Holding (NC)		X	
Mr. Collins (GA)		X	
Mr. DeSantis (FL)		X	
Mr. Smith (MO)		X	
[Vacant]			
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)	X		
Mr. Scott (VA)	X		
Ms. Lofgren (CA)	X		
Ms. Jackson Lee (TX)	X		

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Mr. Cohen (TN)	X		
Mr. Johnson (GA)			
Mr. Pierluisi (PR)	X		
Ms. Chu (CA)			
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)	X		
Mr. Garcia (FL)	X		
Mr. Jeffries (NY)	X		
Mr. Cicilline (RI)	X		
Total	11	17	

3. An amendment by Ms. Jackson Lee to provide that nothing in the Act would limit or otherwise affect the ability of the executive branch to comply with judicial decisions interpreting the Constitution or Federal laws. Defeated by a rollcall vote of 13 to 18.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)			
Mr. Coble (NC)		X	
Mr. Smith (TX)			
Mr. Chabot (OH)		X	
Mr. Bachus (AL)		X	
Mr. Issa (CA)		X	
Mr. Forbes (VA)		X	
Mr. King (IA)		X	
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)		X	
Mr. Jordan (OH)		X	
Mr. Poe (TX)			
Mr. Chaffetz (UT)			
Mr. Marino (PA)		X	
Mr. Gowdy (SC)		X	
Mr. Labrador (ID)		X	
Ms. Farenthold (TX)		X	
Mr. Holding (NC)		X	
Mr. Collins (GA)		X	
Mr. DeSantis (FL)		X	
Mr. Smith (MO)		X	
[Vacant]			
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)	X		
Mr. Scott (VA)	X		
Ms. Lofgren (CA)			

ROLLCALL NO. 3—Continued

	Ayes	Nays	Present
Ms. Jackson Lee (TX)	X		
Mr. Cohen (TN)	X		
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)	X		
Ms. Chu (CA)	X		
Mr. Deutch (FL)			
Mr. Gutierrez (IL)	X		
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)	X		
Mr. Garcia (FL)	X		
Mr. Jeffries (NY)	X		
Mr. Cicilline (RI)	X		
Total	13	18	

4. An amendment by Mr. Johnson to provide that nothing in the Act would limit or otherwise affect any action taken by the President, the head of a department or agency of the United States, or any other officer or employee of the United States that concerns a right protected by the Constitution of the United States. Defeated by a rollcall vote of 11 to 15.

ROLLCALL NO. 4

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)			
Mr. Coble (NC)		X	
Mr. Smith (TX)			
Mr. Chabot (OH)		X	
Mr. Bachus (AL)		X	
Mr. Issa (CA)			
Mr. Forbes (VA)		X	
Mr. King (IA)		X	
Mr. Franks (AZ)			
Mr. Gohmert (TX)		X	
Mr. Jordan (OH)		X	
Mr. Poe (TX)			
Mr. Chaffetz (UT)			
Mr. Marino (PA)		X	
Mr. Gowdy (SC)		X	
Mr. Labrador (ID)		X	
Ms. Farenthold (TX)		X	
Mr. Holding (NC)			
Mr. Collins (GA)		X	
Mr. DeSantis (FL)		X	
Mr. Smith (MO)		X	
[Vacant]			
Mr. Conyers, Jr. (MI), Ranking Member	X		

ROLLCALL NO. 4—Continued

	Ayes	Nays	Present
Mr. Nadler (NY)	X		
Mr. Scott (VA)	X		
Ms. Lofgren (CA)			
Ms. Jackson Lee (TX)	X		
Mr. Cohen (TN)	X		
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)	X		
Ms. Chu (CA)	X		
Mr. Deutch (FL)			
Mr. Gutierrez (IL)	X		
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)	X		
Mr. Garcia (FL)			
Mr. Jeffries (NY)			
Mr. Cicilline (RI)	X		
Total	11	15	

5. An amendment by Mr. Cicilline to provide for the quarterly report by the General Accountability Office to submit to the House and Senate Judiciary Committees a report on the costs of any civil action brought pursuant to this Act, including the attorneys' fees of any attorney that has been hired to provide legal services in connection with a civil action brought pursuant to the Act. Defeated by a rollcall vote of 11 to 16.

ROLLCALL NO. 5

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)			
Mr. Coble (NC)		X	
Mr. Smith (TX)		X	
Mr. Chabot (OH)		X	
Mr. Bachus (AL)		X	
Mr. Issa (CA)			
Mr. Forbes (VA)		X	
Mr. King (IA)		X	
Mr. Franks (AZ)			
Mr. Gohmert (TX)		X	
Mr. Jordan (OH)		X	
Mr. Poe (TX)			
Mr. Chaffetz (UT)			
Mr. Marino (PA)		X	
Mr. Gowdy (SC)		X	
Mr. Labrador (ID)		X	
Ms. Farenthold (TX)		X	
Mr. Holding (NC)			
Mr. Collins (GA)		X	
Mr. DeSantis (FL)		X	

ROLLCALL NO. 5—Continued

	Ayes	Nays	Present
Mr. Smith (MO)		X	
[Vacant]			
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)	X		
Mr. Scott (VA)	X		
Ms. Lofgren (CA)			
Ms. Jackson Lee (TX)	X		
Mr. Cohen (TN)			
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)	X		
Ms. Chu (CA)	X		
Mr. Deutch (FL)			
Mr. Gutierrez (IL)	X		
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)	X		
Mr. Garcia (FL)	X		
Mr. Jeffries (NY)			
Mr. Cicilline (RI)	X		
Total	11	16	

6. An amendment by Mr. Cicilline to provide that an attorney who is not a regular employee of the legislative branch, who is hired to provide legal services in a civil action brought pursuant to this Act to the House of Congress that brought such action consult with any Member of that House who requests a consultation with the attorney regarding the civil action. Defeated by a rollcall vote of 13 to 17.

ROLLCALL NO. 6

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)			
Mr. Coble (NC)		X	
Mr. Smith (TX)		X	
Mr. Chabot (OH)		X	
Mr. Bachus (AL)		X	
Mr. Issa (CA)			
Mr. Forbes (VA)		X	
Mr. King (IA)		X	
Mr. Franks (AZ)			
Mr. Gohmert (TX)		X	
Mr. Jordan (OH)		X	
Mr. Poe (TX)			
Mr. Chaffetz (UT)			
Mr. Marino (PA)		X	
Mr. Gowdy (SC)		X	
Mr. Labrador (ID)		X	

ROLLCALL NO. 6—Continued

	Ayes	Nays	Present
Ms. Farenthold (TX)		X	
Mr. Holding (NC)		X	
Mr. Collins (GA)		X	
Mr. DeSantis (FL)		X	
Mr. Smith (MO)		X	
[Vacant]			
Mr. Conyers, Jr. (MI), Ranking Member			
Mr. Nadler (NY)	X		
Mr. Scott (VA)	X		
Ms. Lofgren (CA)	X		
Ms. Jackson Lee (TX)	X		
Mr. Cohen (TN)	X		
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)	X		
Ms. Chu (CA)	X		
Mr. Deutch (FL)			
Mr. Gutierrez (IL)	X		
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)	X		
Mr. Garcia (FL)	X		
Mr. Jeffries (NY)	X		
Mr. Cicilline (RI)	X		
Total	13	17	

7. Motion to report H.R. 4138 favorably, without amendment.
Passed by a rollcall vote of 18 to 14.

ROLLCALL NO. 7

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman	X		
Mr. Sensenbrenner, Jr. (WI)			
Mr. Coble (NC)	X		
Mr. Smith (TX)	X		
Mr. Chabot (OH)	X		
Mr. Bachus (AL)	X		
Mr. Issa (CA)	X		
Mr. Forbes (VA)	X		
Mr. King (IA)	X		
Mr. Franks (AZ)			
Mr. Gohmert (TX)	X		
Mr. Jordan (OH)	X		
Mr. Poe (TX)			
Mr. Chaffetz (UT)			
Mr. Marino (PA)	X		
Mr. Gowdy (SC)	X		
Mr. Labrador (ID)	X		
Ms. Farenthold (TX)	X		

ROLLCALL NO. 7—Continued

	Ayes	Nays	Present
Mr. Holding (NC)	X		
Mr. Collins (GA)	X		
Mr. DeSantis (FL)	X		
Mr. Smith (MO)	X		
[Vacant]			
Mr. Conyers, Jr. (MI), Ranking Member		X	
Mr. Nadler (NY)		X	
Mr. Scott (VA)		X	
Ms. Lofgren (CA)		X	
Ms. Jackson Lee (TX)		X	
Mr. Cohen (TN)		X	
Mr. Johnson (GA)		X	
Mr. Pierluisi (PR)		X	
Ms. Chu (CA)		X	
Mr. Deutch (FL)			
Mr. Gutierrez (IL)		X	
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)		X	
Mr. Garcia (FL)		X	
Mr. Jeffries (NY)		X	
Mr. Cicilline (RI)		X	
Total	18	14	

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

The Committee advises that a Congressional Budget Office cost estimate was not available at the time this report was printed.

Duplication of Federal Programs

No provision of H.R. 4138 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section

21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

Disclosure of Directed Rule Makings

The Committee estimates that H.R. 4138 specifically directs to be completed no specific rule makings within the meaning of 5 U.S.C. § 551.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 4138 puts a procedure in place to permit the House of Representatives, or the Senate, to authorize a lawsuit against the Executive Branch for failure to faithfully execute the laws.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 4138 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

Section-by-Section Analysis

The following discussion describes the bill as reported by the Committee.

Section 1. Short Title.

Section 1 provides for the short title of the legislation, the “Executive Needs to Faithfully Observe and Respect Congressional Enactments of the Law (ENFORCE the Law) Act.”

Section 2. Authorization to Bring Civil Action for Violation of the Take Care Clause.

Section 2(a) puts a procedure in place to permit the House, or the Senate, to authorize a lawsuit against the Executive Branch for failure to faithfully execute the laws. Specifically, section 2(a) provides that if the President, or any other officer or employee of the United States, establishes or implements a formal or informal policy to refrain from enforcing any provision of Federal law in violation of the requirement that the President “take care that the laws be faithfully executed,” the House or the Senate may, by adoption of a resolution, authorize a civil action to seek declaratory or injunctive relief. Any such lawsuit may be brought by the House of Representatives, the Senate, or both Houses of Congress jointly.

Section 2(b) provides for the content of a resolution to authorize a lawsuit by the House or the Senate. Section 2(c) provides for special court rules for any lawsuit brought pursuant to the legislation: the case must be heard by a three-judge panel in the district court; appeal is directly to the Supreme Court; and the district courts and the Supreme Court are required to expedite the consideration of any case filed pursuant to the legislation.

Dissenting Views

INTRODUCTION

H.R. 4138, the “Executive Needs to Faithfully Observe and Respect Congressional Enactments of the Law Act of 2014” (ENFORCE Act), is a deeply flawed bill, both because of its substance and because of the process by which the Committee considered it. The bill would enable one House of Congress to sue the President, Federal officers, and even Federal employees if that House determines that any of those individuals has failed to “take Care that the Laws be faithfully executed” as required by Article II, Section 3 of the U.S. Constitution.¹

The bill is problematic for several reasons. First, it is a faulty solution in search of a non-existent problem because none of the examples of executive action cited by the bill’s proponents actually demonstrate any failure by the President to execute the laws. Rather, each of them represents the exercise of enforcement discretion, authority that stems from the President’s duty to “take care” that he “faithfully” execute the laws, i.e., the very provision that the bill’s supporters cite. Second, the bill raises serious separation-of-powers concerns and would likely be unconstitutional as applied. Congress likely cannot meet the standing requirements of Article III in an action brought under this bill because the kind of injury that would be alleged—that is, a generalized injury that the President failed to comply with a law—is insufficiently concrete to meet the Constitution’s requirement of a case or controversy.² Additionally, the bill would likely force Federal courts to decide political questions, which are questions that the Constitution commits to the political branches or which are otherwise unfit for a judicial forum. Moreover, the bill threatens to turn Congress into a super enforcement agency with the ability to bring civil actions whenever it disagrees with an exercise of enforcement discretion not only by the President, but by potentially thousands of Federal officers and employees. Finally, the bill could potentially result in numerous, lengthy, and complex court cases for which taxpayers would have to pay the legal bills. Also, it must be noted that there was almost no meaningful deliberative process surrounding the Committee’s consideration of the bill, further calling the soundness of this legislation into question.

For the foregoing reasons, which are more fully discussed below, we dissent from the Committee report and urge our colleagues to oppose this bill.

¹ U.S. CONST. art. II, § 3.

² See discussion *infra*.

DESCRIPTION AND BACKGROUND

DESCRIPTION

Section 1. Short Title. Section 1 sets forth the short title of the bill as the “Executive Needs to Faithfully Enforce and Respect Congressional Enactments of the Law Act of 2014” or “ENFORCE the Law Act of 2014.”

Section 2. Authorization to Bring Civil Action for Violation of the Take Care Clause. Section 2(a) describes procedures for either House of Congress to bring a civil action against the President for violation of the “take care” clause. Specifically, if one House adopts a resolution declaring that the President, the head of any Federal department or agency, or any other Federal officer or employee has established or implemented a formal or informal policy, practice, or procedure not to enforce a Federal law in violation of the “take care” clause, that House would be authorized to bring suit and seek declaratory relief and other relief that a court may deem appropriate based on a declaratory judgment or decree.

Section 2(b), in turn, details the specific requirements for a resolution under section 2(a).

Section 2(c) prescribes special rules for Federal courts to follow in considering a civil action under section 2(a). Specifically, the action is to be heard by a three-judge panel of a Federal district court of competent jurisdiction, and the court’s decision would be reviewable only by direct appeal to the Supreme Court. A notice of appeal must be filed within ten days, presumably of the final decision by the three-judge district court panel. In addition, subsection (c) declares it to be the “duty” of the district courts and the Supreme Court to expedite consideration and disposition of any civil action and appeal under this bill.

BACKGROUND

I. THE “TAKE CARE” CLAUSE AND ENFORCEMENT DISCRETION

Article II, section 3 of the U. S. Constitution states, among other things, that the President “shall take Care that the Laws be faithfully executed.”³ In interpreting the “take care” clause, courts have employed two lines of reasoning that superficially may seem to be in tension. One line of decisions holds that the President is obligated to implement and enforce statutes as written by Congress and that the President has no authority to disregard such statutes.⁴ A second line of decisions, however, makes clear that, in implementing his charge to take care that the laws be faithfully executed, the President and the executive branch that he heads have the authority, and, indeed, the duty *not* to enforce a law in some instances because he has the discretion to determine how a law is enforced or implemented in light of enforcement priorities and limited resources, among many potential factors. As the Supreme Court has stated, “an agency’s decision not to prosecute or enforce,

³U.S. CONST. art. II, §3.

⁴*See, e.g.,* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Kendall v. U.S.*, 37 U.S. (12 Pet.) 524 (1838).

whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.”⁵

Regarding enforcement discretion, the Supreme Court has made clear the “take care” clause requires the President to exercise discretion, noting that decisions not to enforce have “long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to ‘take Care that the Laws be faithfully executed.’”⁶ As to delays in implementing statutes, executive branch administrative agencies, which report to the President, routinely miss rulemaking deadlines set by Congress in statutes and no court has thus far held that such decisions by themselves constitute constitutional violations. Notably, no court has ever invalidated an agency’s exercise of prosecutorial or administrative discretion on the grounds that it violated the “take care” clause.⁷

II. ARTICLE III STANDING REQUIREMENT

In order to participate as party litigants in any suit, congressional plaintiffs—whether they be individual Members, committees, or Houses of Congress—must demonstrate that they meet the requirements established by Article III of the Constitution, including standing to sue. The failure to establish standing is fatal to the litigation and will result in its dismissal without the court addressing the merits of the presented claims.

Generally, the doctrine of standing is a threshold question that does not turn on the merits of a plaintiff’s complaint, but, rather, on whether the particular plaintiff has a legal right to a judicial determination on the issues before the court.⁸ The law with respect to standing is a mix of both constitutional requirements and prudential considerations.⁹ Article III of the Constitution specifically limits the exercise of Federal judicial power to “cases” and “controversies.”¹⁰ Accordingly, the courts have “consistently declined to exercise any powers other than those which are strictly judicial in their nature.”¹¹ Thus, it has been said that “the law of Art. III standing is built on a single basic idea—the idea of separation of powers.”¹²

To satisfy the constitutional standing requirements in Article III, the Supreme Court imposes three requirements. First, the plaintiff must allege a personal injury-in-fact, which is actual or imminent, concrete, and particularized. Second, the injury must be “fairly traceable to the defendant’s allegedly unlawful conduct.”¹³ Third,

⁵ Heckler v. Chaney, 470 U.S. 821, 831 (1985).

⁶ *Id.* at 832.

⁷ Kate M. Manuel & Todd Garvey, *Prosecutorial Discretion in Immigration Enforcement: Legal Issues*, Congressional Research Service Report for Congress, R42924, Dec. 27, 2013, at 17 [hereinafter “CRS Immigration Report”] (“no court appears to have invalidated a policy of non-enforcement founded upon prosecutorial discretion on the grounds that the policy violated the Take Care Clause, and one Federal appellate court has opined that real or perceived inadequate enforcement does not constitute a reviewable abdication of duty”) (quoting *Texas v. United States*, 106 F.3d 661, 667 (5th Cir. (1997)) (internal marks omitted).

⁸ *Flast v. Cohen*, 392 U.S. 83, 99 (1968).

⁹ *Dep’t of Commerce v. House of Representatives*, 525 U.S. 316, 328–29 (1999).

¹⁰ U.S. CONST. art. III, § 2.

¹¹ *Raines v. Byrd*, 521 U.S. 811, 819 (1997) (quoting *Muskrat v. U.S.*, 219 U.S. 346, 356 (1911)).

¹² *Id.* at 820 (quoting *Allen v. Wright*, 468 U.S. 737, 752 (1984)).

¹³ *Dep’t of Commerce*, 525 U.S. at 329 (quoting *Allen*, 468 U.S. at 751).

the injury must be “likely to be redressed by the requested relief.”¹⁴

Raines v. Byrd is the Supreme Court case that established the current standard for evaluating whether individual Members of Congress have standing to sue the executive branch.¹⁵ In *Raines*, the Supreme Court dismissed a suit by Members challenging the constitutionality of the Line Item Veto Act, holding that their complaint did not establish that they had suffered a personal, particularized, and concrete injury.¹⁶ The Court held that a congressional plaintiff may have standing in a suit against the executive branch if he or she alleges either: (1) a personal injury (e.g., loss of a Member’s seat), or (2) an institutional injury that is not “abstract and widely dispersed” and amounts to vote nullification.¹⁷ In *Raines*, the Court concluded that the plaintiffs asserted an institutional injury, but their votes were not nullified because of the continued existence of other legislative remedies. These legislative remedies included the ability of “a majority of Senators and Congressman [to] vote to repeal the Act, or to exempt a given appropriations bill (or a given provision in an appropriations bill) from the Act. . . .”¹⁸

It appears that an institutional plaintiff has only been successful in establishing standing when it has been authorized to seek judicial recourse on behalf of a House of Congress. In the past, a one-house resolution that specifically authorizes judicial recourse has satisfied this authorization requirement, although authorization alone is only one part of the standing analysis.¹⁹

The *Raines* vote nullification requirement would likely not be satisfied in cases where an institutional plaintiff files suit to challenge an executive action because, unlike in the subpoena enforcement context, legislative actions that remedy the institutional plaintiff’s injury could exist. Therefore, whether or not the *Raines* vote nullification standard applies to institutional plaintiffs may be an important factor in determining if an authorized institutional plaintiff has standing to challenge an executive action.

If the *Raines* vote nullification standard were applied to institutional plaintiffs, the existence of legislative remedies may prevent an institutional plaintiff, like a House of Congress, from establishing standing. The following actions could serve as potential remedies to executive actions: the repeal or disapproval of executive branch regulations or guidance documents establishing the challenged policies; employing the power of the purse to restrict the

¹⁴*Id.* In addition to the constitutional questions posed by the doctrine of standing, Federal courts also follow a well-developed set of prudential principles that are relevant to a standing inquiry. Unlike their constitutional counterparts, prudential standing requirements are judicially created and “can be modified or abrogated by Congress.” *Bennett v. Spear*, 520 U.S. 154, 162 (1997). These prudential principles require that: (1) the plaintiff assert his own legal rights and interests, rather than those of a third party; (2) the plaintiff’s complaint fall within the “zone of interests” protected or regulated by the statute or constitutional guarantee in question; and (3) the plaintiff not assert “‘abstract questions of wide public significance’ which amount to ‘generalized grievances’ pervasively shared and most appropriately addressed in the representative branches.” *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State*, 454 U.S. 464, 475 (1982) (quoting *Warth v. Seldin*, 422 U.S. 490, 499–500 (1975)).

¹⁵521 U.S. 811 (1997).

¹⁶*Id.* at 818–820.

¹⁷*Id.* at 829.

¹⁸*Id.* at 824.

¹⁹*See* Comm. on the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 71 (D.D.C. 2008) (finding that House Judiciary Committee had standing to sue to enforce a congressional subpoena in part because it “ha[d] been expressly authorized . . . by the House of Representatives as an institution” to bring the suit by House resolution).

use of funds to administer objectionable programs; legislation eliminating, limiting, or clarifying the scope of agency discretion with regard to the implementation of existing laws; and oversight activity. Because the Constitution requires parties to meet Article III standing requirements, Congress cannot simply overcome those requirements by claiming to grant itself standing to sue.

CONCERNS WITH H.R. 4138

I. H.R. 4138 IS A FUNDAMENTALLY FLAWED SOLUTION TO A NON-EXISTENT PROBLEM

An initial problem with H.R. 4138 is that it is based on the false premise that President Barack Obama has failed in his duty to take care that he faithfully execute the laws. Over the course of two House Judiciary Committee oversight hearings on the “take care” clause, H.R. 4138’s proponents sought to portray certain actions of President Obama as examples of his failure to execute the law. They cited, for example, the President’s Deferred Action for Childhood Arrivals (DACA) program, which temporarily defers removal of certain young adults who were brought into the country as young children.²⁰ In addition, they cited several decisions by the Administration to delay or clarify the implementation of certain provisions of the Patient Protection and Affordable Care Act (ACA) as examples of the President’s failure to faithfully execute the laws.²¹ Finally, they alleged that the Justice Department’s revised charging guidelines for certain non-violent, low-level drug offenders amounted to a failure to enforce the law.²² The modified charging guidelines direct prosecutors to charge certain low-level, nonviolent drug offenders with offenses that do not trigger mandatory minimum sentences.²³

Rather than being examples of constitutional violations, however, these examples merely illustrate the President’s exercise of enforcement discretion in light of limited available resources, which is not only within the President’s constitutional authority, but is required by the “take care” clause. For instance, the decisions to delay the employer mandates and to allow the renewal of otherwise non-ACA-compliant health insurance plans for a temporary time period were attempts to phase-in implementation of the ACA and were not an attempt to prevent implementation. Moreover, the provision of subsidies for those in Federal exchanges was consistent with the text, history, and purpose of the ACA. It would defy common sense to suggest that the President would act to undermine his signature legislative accomplishment.

In response to questions regarding the Administration’s legal authority for delaying implementation, the Treasury Department explained that this delay “is an exercise of the Treasury Depart-

²⁰ See generally *Enforcing the President’s Constitutional Duty to Faithfully Execute the Laws: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. (2014) [hereinafter *Enforcing Constitutional Duty Hearing*]; *President’s Constitutional Duty to Faithfully Execute the Laws: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. (2013) [hereinafter *Faithfully Execute Hearing*].

²¹ *Id.*

²² See *Enforcing Constitutional Duty Hearing*.

²³ Attorney General Eric H. Holder, Jr., Annual Meeting of the American Bar Association’s House of Delegates, Aug. 12, 2013, <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html>.

ment's longstanding administrative authority to grant transition relief when implementing legislation like the ACA. Administrative authority is granted by section 7805(a) of the Internal Revenue Code.²⁴ Section 7805(a) provides that "the Secretary [of the Treasury] shall prescribe all needful rules and regulations for the enforcement of this title."²⁵

As the Treasury Department further explained, "[t]his authority has been used to postpone the application of new legislation on a number of prior occasions across Administrations."²⁶ The Department provided several past examples where it had delayed or waived a statutory requirement, including its decision during the George W. Bush Administration to delay implementation of standards return preparers must follow to avoid penalties under the Small Business Work Opportunity Act of 2007 until 2008 despite the fact that Congress made those changes effective as of May 25, 2007.²⁷

Allowing flexibility in the implementation of a new program, even where the statute mandates a specific deadline, is neither unusual nor a constitutional violation. Such flexibility is integral to the President's duty to "take care" that he "faithfully" execute laws. The exercise of enforcement discretion is a traditional power of the executive. As Duke University Law School Professor Christopher Schroeder testified before the Committee, "Discretionary choices are unavoidable features in executing almost all laws."²⁸ He further testified that the "priority setting decisions necessitated by budget constraints necessarily affect *how* the laws are being executed at any point in time, not *whether* they are being executed."²⁹ He also noted that such discretionary enforcement decisions were routine and were too numerous to count.³⁰

With respect to the Administration's implementation of DACA, and its immigration-related enforcement decisions more generally, the exercise of discretion in immigration enforcement is squarely within the President's authority. The Supreme Court has consistently held that the exercise of such discretion is a function of the President's powers under the "take care" clause and has reiterated this principle in the immigration enforcement context as recently as 2012 in its decision in *Arizona v. United States*.³¹ As both Representative Luis Guterrez (D-IL) and Professor Schroeder pointed out during the second hearing on the "take care" clause, DACA is not a case where the President has decided simply to not enforce

²⁴ Letter from Mark J. Mazur, Assistant Secretary for Tax Policy, U.S. Department of the Treasury to Chairman Fred Upton, *et al.*, at 2 (July 9, 2013), available at <http://democrats.energycommerce.house.gov/sites/default/files/documents/Upton-Treasury-ACA-2013-7-9.pdf> [hereinafter "Mazur Letter"].

²⁵ 26 U.S.C. § 7805 (2014).

²⁶ Mazur Letter at 2.

²⁷ *Id.*

²⁸ *Enforcing Constitutional Duty Hearing* (statement of Christopher H. Schroeder, Charles S. Murphy Professor of Law and Professor of Public Policy Studies, Duke University, at 3) [hereinafter "Schroeder statement"].

²⁹ *Id.* at 6 (emphases in original).

³⁰ *Id.*

³¹ 132 S. Ct. 2492 (2012). The Court relied upon the "broad discretion" exercised by Federal immigration officials, including "whether it makes sense to pursue removal at all," in striking down almost all of Arizona's sweeping anti-immigrant law (SB 1070). *Id.* at 2499. Because Arizona's law could result in "unnecessary harassment of some aliens (for instance, a veteran, college student, or someone assisting with a criminal investigation) whom Federal officials determine should not be removed," the Court concluded that the law "violates the principle that the removal process is entrusted to the discretion of the Federal Government." *Id.* at 2506.

the law for an entire class of people.³² Although the policy applies broadly, immigration authorities must still make particular decisions regarding removal of an individual on a case-by-case basis to ensure that the individual meets DACA's qualifications.

Immigration officials may exercise enforcement discretion in individual cases or "prosecutorial discretion may be more formalized and generalized through agency regulations or procedures."³³ In fact, Congress expressly directed the Secretary of Homeland Security to establish "national immigration enforcement policies and priorities."³⁴ The Administration's DACA policy comports both with the statutory directive to establish national enforcement priorities and with the responsibility to exercise prosecutorial discretion under the "take care" clause of the Constitution.

While some critics argue that DACA can be distinguished because the possibility for relief is extended to persons who fall within a larger category, this ignores the fact that specific decisions to defer action still are made on a case-by-case basis. It also overlooks the fact that the executive branch has exercised its enforcement discretion on a categorical basis for decades. For example, the Kennedy Administration extended voluntary departure to persons from Cuba on a categorical basis, which allowed many otherwise deportable individuals to remain in the United States for an extended period of time.³⁵ President George W. Bush's Administration temporarily suspended sanctions on employment of unauthorized aliens in areas affected by Hurricane Katrina and directed agents and officers to exercise prosecutorial discretion with respect to nursing mothers.³⁶

As with DACA, the revised Justice Department charging guidelines still require particular charging decisions to be made on a case-by-case (not class-wide) basis to ensure that a particular offender meets the required criteria. Assessing the particular facts of a case to the appropriate criminal charge is a core function of prosecutorial discretion, the wide latitude that prosecutors have in determining when, whom, how, and even whether to prosecute apparent violations of the law. Far from violating the "take care" clause, prosecutorial discretion derives from this obligation to "take care" to "faithfully" execute the law.

Regarding the seeming tension between the duty to execute the laws and decisions not to enforce the law, Professor Schroeder testified:

At first blush, it may seem paradoxical to say that an agency is executing the laws when it decides not to enforce the law, but the paradox is completely eliminated once one recognizes that executing laws encompasses many activities, not all of which can be performed at any given time.

³² Enforcing Constitutional Duty Hearing.

³³ Memorandum from Bo Cooper, General Counsel, INS, INS Exercise of Prosecutorial Discretion, July 11, 2000, at 17–18, available at <http://iwp.legalmomentum.org/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/Bo-Cooper-memo%20pros%20discretion7.11.2000.pdf/view>.

³⁴ 6 U.S.C. § 202 (2014).

³⁵ CRS Immigration Report at 1.

³⁶ *Id.*; Memorandum from Julie L. Myers, Assistant Secretary, Immigration and Customs Enforcement, Prosecutorial and Custodial Discretion, Nov. 7, 2007, available at <http://www.scribd.com/doc/22092973/ICE-Guidance-Memo-Prosecutorial-Discretion-Julie-Myers-11-7-07>.

Insofar as making decisions about where and when to enforce frees up resources for other activities constitutive of law execution, non-enforcement decisions are part of the overall process of executing the laws.³⁷

In short, the examples that the proponents of H.R. 4138 cite to justify its radical scheme to allow one House of Congress to sue the President fail to support the underlying premise of the bill, which is that routine exercises of enforcement discretion amount to violations of the President’s duty to take care that the laws be faithfully executed. In the absence of any credible examples of such a failure to meet his constitutional obligations, the justification for the bill fails.

II. H.R. 4138 VIOLATES SEPARATION-OF-POWERS PRINCIPLES AND WOULD LIKELY BE UNCONSTITUTIONAL AS APPLIED

A. Congress Would Likely Lack Article III Standing to Sue

Congress would likely lack the constitutionally-required standing to sue pursuant to H.R. 4138 because the alleged injury—i.e., the alleged failure to take care that a law be faithfully executed—is not the kind of a concrete and particularized injury to Congress sufficient to confer Article III standing on Congress to sue pursuant to the ENFORCE Act. Rather, it amounts only to a generalized complaint that the executive branch did not follow the law. The Supreme Court has made clear that injury “amounting only to the alleged violation of a right to have the Government act in accordance with law was not judicially cognizable” for Article III standing purposes.³⁸ To allow standing based on an “undifferentiated public interest in executive officers’ compliance with the law . . . is to transfer from the President to the courts the Chief Executive’s most important constitutional duty, to ‘take care that the Laws be faithfully executed.’”³⁹ Congress cannot simply “give itself” Article III standing where it does not exist, as some Members of the Committee Majority contended during the markup debate on this bill.

Article III’s standing requirements enforce the Constitution’s separation-of-powers principles. The separation of law-making from law-execution is a distinctive feature of the U.S. Constitution, and as part of this structural separation, the Supreme Court has held that the Constitution bars Congress from vesting itself with the power to appoint officers charged with executing Federal laws, including through litigation.⁴⁰

Representative Trey Gowdy (R-SC), H.R. 4138’s sponsor, repeatedly claimed during the markup that the bill merely “codifies” the Supreme Court’s decision in *Coleman v. Miller*, where the Court held that members of the Kansas legislature who voted against ratification of a proposed amendment to the U.S. Constitution had standing to sue the state’s lieutenant governor for acting beyond his authority when he cast the tie-breaking vote for ratification.⁴¹ The Court reasoned that the legislators had a “plain, direct and

³⁷ Enforcing Constitutional Duty Hearing (Schroeder statement at 7).

³⁸ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 575–576 (1992).

³⁹ *Id.* at 577.

⁴⁰ *Buckley v. Valeo*, 424 U.S. 1, 138–140 (1976).

⁴¹ 307 U.S. 433 (1939).

adequate interest in maintaining the effectiveness of their votes” and, therefore, had standing under Article III because the legislators had the right to have their votes against ratification be given full effect under the Constitution.⁴² After finding that the legislators had standing, the Court ultimately held that because Article V of the Constitution grants Congress undivided power to control the amendment process, questions about the ratification process were “political questions” that were non-justiciable.⁴³

Raines, however, significantly limited the reach of the *Coleman* decision to challenge executive action, making it clear that in order for legislators to have standing, they must allege an injury that would amount to vote nullification, that is, that other legislative remedies are not available to address the asserted institutional injury.⁴⁴ As the Court in *Raines* noted, it is not enough that a Member simply lost a vote or cannot garner majority support for a position. To establish vote nullification for Article III standing purposes, a legislative plaintiff must establish that his or her votes will in the future be nullified.⁴⁵ So long as future Senators and House Members retain the power to vote to repeal an Act or deny appropriations or take any number of other measures in response to executive action, their votes cannot be said to have been nullified and they cannot meet Article III’s requirement that they suffer a concrete injury.⁴⁶

Here, none of the examples raised by H.R. 4138’s proponents establish that the votes of Members of Congress were nullified. Rather, in each case, Congress retains the power to repeal or disapprove executive branch regulations or guidance documents establishing the challenged policies; employ the power of the purse to restrict the use of funds to administer objectionable programs; pass legislation eliminating, limiting, or clarifying the scope of agency discretion with regard to the implementation of existing laws; deny confirmation of nominees; and engage in oversight of executive branch activity. Any action pursuant to H.R. 4138 to challenge executive action, therefore, would not meet the test for Article III standing for legislators as articulated in *Raines*.

H.R. 4138’s proponents also cannot rely on court decisions finding standing for one House of Congress to sue to enforce a subpoena. In the subpoena enforcement context, the institutional plaintiff is alleging a concrete injury to a special prerogative of the legislative body—i.e., to defend the power of the legislative body to perform its oversight and information gathering duties.⁴⁷ By contrast, H.R. 4138 contemplates lawsuits where no special prerogative of Congress, or one House of Congress, is at stake. Rather, any suit to enforce the “take care” clause necessarily only alleges an “undifferentiated public interest in executive officers’ compliance

⁴² *Id.* at 437–438.

⁴³ *Id.* at 450.

⁴⁴ *Raines*, 524 U.S. at 824.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See *Committee on the Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008). Similarly, in *INS v. Chadha*, the Court found institutional standing for the House and Senate to intervene because the alleged injury—a challenge to the constitutionality of the one-House legislative veto—threatened a mode of Congressional action. *INS v. Chadha*, 462 U.S. 919 (1983).

with the law” which is insufficient to establish Article III standing.⁴⁸

Additionally, even if Congress as a whole could establish a concrete injury pursuant to the ENFORCE Act, any legislative interest in enforcing the “take care” clause against the President would belong to the entire Congress, not just one House. To the extent that the ENFORCE Act permits one House to proceed with a lawsuit, it violates this principle. Allowing only one House to pursue litigation to enforce the “take care” clause as it sees fit heightens the risk that courts would become the arbiters of partisan differences between elected officials.

Even Professor Elizabeth Foley, one of the Majority witnesses who testified last month that Congress has standing to sue to enforce the “take care” clause, contradicted herself in a prior statement that she wrote less than three weeks before her Committee appearance. In that prior statement, she said:

Congress probably can’t sue the president, either. The Supreme Court has severely restricted so-called “congressional standing,” creating a presumption against allowing Members of Congress to sue the president merely because he fails to faithfully execute its laws.⁴⁹

Professor Jonathan Turley, another Majority witness, testified at the first hearing on the “take care” clause that courts are quite hostile toward recognizing Member standing for purposes of pursuing constitutional violations.⁵⁰ While not commenting directly on Congress’s institutional standing, he noted that the current situation is one where no one could successfully raise a President’s failure to faithfully execute the laws as an issue in court.⁵¹

In his dissent in *United States v. Windsor*, no less a conservative than Justice Antonin Scalia, joined by Chief Justice John Roberts and Justice Clarence Thomas, criticized a dissent by Justice Samuel Alito that tracked the reasoning underlying H.R. 4138, writing:

Heretofore in our national history, the President’s failure to “take Care that the Laws be faithfully executed,” could only be brought before a judicial tribunal by someone whose concrete interests were harmed by that alleged failure. Justice Alito would create a system in which Congress can hale the Executive before the courts not only to vindicate its own institutional powers to act, but to correct a perceived inadequacy in the execution of its laws. This system would lay to rest Tocqueville’s praise of our judicial system as one which “intimately binds the case made for the law with the case made for one man,” one in which legislation is “no longer exposed to the daily aggression of the parties,” and in which “the political question that the judge must resolve is linked to the interest of private litigants.”

⁴⁸ Lujan, 504 U.S. at 577.

⁴⁹ Elizabeth Price Foley, *Why Not Even Congress Can Sue the Administration Over Unconstitutional Executive Actions*, Daily Caller, Feb. 7, 2014, available at <http://dailycaller.com/2014/02/07/why-not-even-congress-can-sue-the-administration-over-unconstitutional-executive-actions/>.

⁵⁰ Faithfully Execute Hearing at 58.

⁵¹ *Id.* at 59.

That would be replaced by a system in which Congress and the Executive can pop immediately into court, in their institutional capacity, whenever the President refuses to implement a statute he believes to be unconstitutional, and whenever he implements a law in a manner that is not to Congress's liking.

If majorities in both Houses of Congress care enough about the matter, they have available innumerable ways to compel executive action without a lawsuit—from refusing to confirm Presidential appointees to the elimination of funding.⁵²

For these reasons, Justice Scalia concluded that the Court had no power to decide the suit. We agree with Justice Scalia's view and believe, for that reason, that Congress would fail to meet the Constitution's standing requirements in any civil action pursuant to H.R. 4138.

B. H.R. 4138 Presents a Political Question Problem

The ENFORCE Act presents a grave political question problem. Federal courts will not hear a case if they find that it presents a political question. The Supreme Court has held that Federal courts should not hear cases that deal directly with issues for which the Constitution has directly given responsibility to the other branches of government or for which a judicial forum is otherwise inappropriate. In the leading decision, *Baker v. Carr*, the Court enumerated the various factors that would make a question political:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.⁵³

Professor Laurence Tribe of Harvard Law School, in a memorandum to House Judiciary Committee Democratic staff analyzing a bill similar to H.R. 4138, noted that the Supreme Court's jurisprudence regarding section 701(a)(2) of the Administrative Procedure Act (APA)⁵⁴ indicates how unwilling the Court is to become involved with telling an executive branch agency how to exercise

⁵² U.S. v. Windsor, 133 S. Ct. 2675, 2703–05 (2013) (Scalia, J., dissenting) (internal citations and marks omitted).

⁵³ 369 U.S. 186, 217 (1962).

⁵⁴ 5 U.S.C. §§551–59, 701–06, 1305, 3105, 3344, 5372, 7521 (2014).

its discretion.⁵⁵ He noted Justice Scalia’s opinion in *Norton v. South Utah Wilderness Alliance*, where Scalia said:

If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved—which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management.⁵⁶

Professor Tribe explained that although Justice Scalia was interpreting the APA, there was nothing about his analysis that would not fall under the Court’s political question jurisprudence as well.⁵⁷ Virtually all of the factors enumerated in *Baker v. Carr* would be implicated by allowing Congress to sue the President over enforcement of the “take care” clause. Professor Tribe concluded that in such a civil action, a judge would be put in the position of directing a Federal officer how to exercise his or her discretion in enforcing a law, and doing so would cut at the heart of separation of powers and, for that reason, would likely lead to the invalidation of a statute like H.R. 4138.⁵⁸

Recognizing that the ENFORCE Act could upend the carefully balanced separation-of-powers inherent in the Constitution, several Members offered amendments to limit the potential damage that the legislation could do. For instance, Committee Ranking Member John Conyers, Jr. (D-MI) offered an amendment to exclude from the bill’s scope any executive action taken to combat discrimination and protect civil rights. As Representative Conyers noted, both the Emancipation Proclamation and Executive Order 9981, by which President Truman desegregated the Nation’s armed forces, were actions that were contrary to then-existing law. Had the ENFORCE Act been in place when those actions were taken, Congress could have sued the President based on an alleged failure to faithfully execute then-existing law. Notwithstanding this point, the amendment was defeated by a party-line vote of 11 to 16.

Similarly, Representative Hank Johnson (D-GA) offered an amendment to exclude from the bill’s scope any executive action taken to protect constitutional rights to allow maximum flexibility for the President and executive branch officials to exercise their discretion so that constitutional rights could be protected. This amendment recognized that in some circumstances, protecting rights would require a President to refrain from taking action. Nonetheless, the Committee rejected the amendment by a party-line vote of 11 to 15.

Representative Jerrold Nadler (D-NY) offered an amendment to exclude from the bill’s scope any exercise of the executive branch’s clearly established authority to exercise prosecutorial discretion. As outlined extensively above, the exercise of prosecutorial discretion

⁵⁵ Memorandum from Laurence H. Tribe to Democratic Staff of the House Judiciary Committee 5 (Mar. 3, 2014) (on file with H. Committee on the Judiciary, Democratic Staff) [hereinafter “Tribe memo”].

⁵⁶ 542 U.S. 55, 66–67 (2004).

⁵⁷ Tribe memo at 5.

⁵⁸ *Id.* at 6.

stems from the President's obligation to "take care" in "faithfully" executing the laws. Such discretion in setting enforcement priorities and in determining the manner of implementing laws is required in light of the limited resources available to enforce laws. To the extent that H.R. 4138's proponents claim that the bill does not hamper traditional enforcement discretion, they should have had no objection to adopting this amendment. Notwithstanding this, the Committee rejected the amendment by a 11 to 17 party-line vote.

Also in recognition of the need to protect separation-of-powers, Representative Sheila Jackson Lee (D-TX) offered an amendment to exclude from the bill's scope any executive action to protect the executive branch's ability to comply with judicial decisions interpreting the Constitution or Federal laws. If separation-of-powers principles require anything, it is that each branch must respect its constitutional role. When a court issues a decision interpreting the Constitution or a Federal law, the other branches must abide by the decision. The executive branch's ability to fulfill its obligation to comply with judicial decisions should not be hampered by a civil action by Congress pursuant to this bill. Basic respect for separation of powers required adoption of this amendment. Nonetheless, the Committee rejected it on a party-line vote of 13 to 18.

C. H.R. 4138 Would Make Congress a Super Enforcement Agency

The ENFORCE Act would essentially empower one House of Congress to become a general enforcement body able to rove over the entire field of administrative action by bringing cases against the President whenever it disagrees with the President or any component of the executive branch's exercise of enforcement discretion. Effectively, one House of Congress could seize for itself the scope of power of the Justice Department and executive enforcement agencies. This bill would intrude on a core function of the presidency and the constitutional duties of the President in determining how to implement or enforce the law. The bill radically and dangerously undermines the balance between the extensive administrative functions that are committed to the executive branch and the legislative functions of Congress.⁵⁹

III. H.R. 4138 IS AN INVITATION TO WASTEFUL SPENDING OF TAXPAYER MONEY

H.R. 4138 potentially could open the floodgates to possibly endless litigation over any number of decisions of not only the President, but of *any* Federal officer or employee. Such litigation would be time-consuming, complex, and expensive, particularly when outside counsel is retained. For instance, a law firm hired to represent the House in its defense of the Defense of Marriage Act charged \$520 an hour for its services and received an initial \$500,000 fee.⁶⁰

⁵⁹ See *Morrison v. Olson*, 487 U.S. 654, 658, 685 (1988) (noting that a statute is suspect if it "involve[s] an attempt by Congress to increase its own powers at the expense of the executive branch" and if Congress "impermissibly interferes with the President's exercise of his constitutionally appointed function," which would include his obligation to take care that the laws be faithfully executed).

⁶⁰ Letter from Representative Nancy Pelosi, Democratic Leader, to Representative John Boehner, Speaker of the House, Concerning Litigation on the Defense of Marriage Act, April 20,

The House ultimately spent \$1.5 million on that litigation.⁶¹ The cost of what would likely be frivolous litigation under H.R. 4138 would have to be borne by American taxpayers.

Recognizing that in its unconstitutional scheme to use the courts to mediate political disputes between one House of Congress and the President, this bill threatens to drain precious limited public resources, Representative David Cicilline (D-RI) offered an amendment requiring that the Government Accountability Office issue quarterly reports to the House and Senate Judiciary Committees setting forth the costs of any litigation pursued under the ENFORCE Act. In response to Representative Cicilline's concerns about costs, the Majority simply indicated that any cost was worth the price. Unfortunately, the Committee rejected this common-sense, good-government amendment by a party-line vote of 11 to 16.

In addressing another point broadly related to costs, Representative Cicilline offered an amendment to ensure that any outside counsel hired to represent a House of Congress in litigation pursuant to the ENFORCE Act must consult with any Member of that House who requests consultation. As Representative Cicilline noted, Members had been denied the opportunity for such consultation when the House hired outside counsel to represent it in litigation defending the constitutionality of the Defense of Marriage Act. To avoid a similar situation from arising under this bill, Representative Cicilline offered his common-sense amendment. Unfortunately, the Committee rejected it by a party-line vote of 13 to 17.

IV. THERE WAS A NEAR COMPLETE ABSENCE OF GENUINE DELIBERATIVE PROCESS

Further undermining the soundness of H.R. 4138 is the fact that there was an utter lack of deliberative process regarding this legislation. The Committee never held a single legislative hearing on this bill, nor did it hold any Subcommittee markup. In fact, the final text of this bill was not made available until just the day before the markup. Taking into consideration the fact that the Majority provided only the minimum notice for the markup of this bill, that no single member of the Majority voted for any one of the six amendments offered by Democratic Members, and that we have not received any budgetary impact estimate from the Congressional Budget Office, it is plainly obvious that the entire legislative process is an unserious attempt to legislate.

CONCLUSION

H.R. 4138 is highly problematic for many reasons. It is based on the false premise that the President is failing to faithfully execute the laws. Moreover, it violates separation-of-powers principles and is likely unconstitutional as applied in several ways. First, Congress likely cannot meet Article III's standing requirements in any civil action under this bill. Second, this legislation would likely

2011, available at <http://www.democraticleader.gov/news/press/pelosi-questions-boehner-house-contract-outside-doma-counsel>.

⁶¹Jennifer Bendery, *DOMA Defense by House Republican Leaders Has Cost Nearly \$1.5 Million*, Huffington Post, Oct. 16, 2012, available at http://www.huffingtonpost.com/2012/10/16/doma-house-republicans_n_1971666.html.

force courts to decide political questions, which courts have wisely refrained from deciding. Third, it would make Congress the ultimate enforcement agency by allowing it to second-guess through litigation even routine discretionary enforcement decisions with which it might disagree. Finally, the legislation fails to account for the potentially limitless costs of engaging in litigation every time one house of Congress disagrees with the President.

For these reasons, we strongly oppose H.R. 4138.

JOHN CONYERS, JR.
JERROLD NADLER.
ROBERT C. "BOBBY" SCOTT.
ZOE LOFGREN.
SHEILA JACKSON LEE.
STEVE COHEN.
HENRY C. "HANK" JOHNSON, JR.
PEDRO R. PIERLUISI.
JUDY CHU.
TED DEUTCH.
LUIS V. GUTIERREZ.
KAREN BASS.
CEDRIC RICHMOND.
JOE GARCIA.
HAKEEM JEFFRIES.
DAVID N. CICILLINE.

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