Dissenting Views

INTRODUCTION

H.R. 3973, the "Faithful Execution of the Law Act of 2014," would require the Attorney General to report to Congress any instance when any Federal officer establishes or implements a formal or informal policy to refrain from enforcing, applying, or administering any Federal law as well as to state the grounds underlying such a non-enforcement policy. It does this by expanding 28 U.S.C. § 530D(a)(1)(A), which currently only requires the Attorney General to report to Congress any instance when the Attorney General or other Justice Department officer establishes or implements a non-enforcement policy on the grounds that the relevant provision of law is unconstitutional.

The burdensome mandate that H.R. 3973 would impose on the Attorney General will not only result in confusion and drain already-limited law enforcement resources, but would also present separation-of-powers concerns when applied in certain circumstances, such as the conduct of foreign policy. H.R. 3973 would require the Attorney General to oversee all Federal officers and would require him to determine in every instance when they prioritize enforcement of some classes of cases over others, whether such exercises of discretion constitute a "policy" of non-enforcement. It is also very troubling that there was absolutely no deliberative process concerning this bill as there was neither a legislative hearing nor a Subcommittee markup of the bill.

Simply put, this bill is a thoroughly flawed solution in search of an imaginary problem. Over the course of two House Judiciary Committee oversight hearings on the issue of whether President Barack Obama has failed to faithfully execute the laws,[1] the bill's proponents failed to identify a single credible example of such failure. It is clear that the bill's proponents have confused constitutional violations with the President's legitimate exercise of enforcement discretion, which not only is well within his authority but is, in fact, required by the United States Constitution's command that he "take care" to "faithfully" execute the laws.

For these reasons and others explained in greater detail below, we must dissent from the Committee report on this bill and urge our colleagues to oppose it.

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[1] *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"].

DESCRIPTION AND BACKGROUND

DESCRIPTION

Section 1. Short Title. Section 1 sets forth the short title of the bill as the "Faithful Execution of the Law Act of 2014."

Section 2. Amendment to Section 530D of Title 28, United States Code. Section 2 amends 28 U.S.C. § 530D(a)(1)(A). In pertinent part, section 530D requires the Attorney General to report to Congress any instance when the Attorney General or other Justice Department officer establishes or implements a formal or informal policy to refrain from enforcing, applying, or administering any Federal law on the grounds that such provision is unconstitutional.[2] H.R. 3973 amends this reporting requirement to require the Attorney General to make such a report: (1) when a Justice Department official "or any other federal officer" establishes or implements a non-enforcement policy; and (2) requires that the report state the grounds, not limited to unconstitutionality, underlying any policy of non-enforcement.

BACKGROUND

Article II, section 3 of the United States 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 at first blush. 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, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."[5]

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[2] 28 U.S.C. § 530D(a)(1)(A) provides:

(1) In general.—The Attorney General shall submit to the Congress a report of any instance in which the Attorney General or any officer of the Department of Justice—

(A) establishes or implements a formal or informal policy to refrain-

(i) from enforcing, applying, or administering any provision of any Federal statute, rule, regulation, program, policy, or other law whose enforcement, application, or administration is within the responsibility of the Attorney General or such officer on the grounds that such provision is unconstitutional; or

(ii) within any judicial jurisdiction of or within the United States, from adhering to, enforcing, applying, or complying with, any standing rule of decision (binding upon courts of, or inferior to those of, that jurisdiction) established by a final decision of any court of, or superior to those of, that jurisdiction, respecting the interpretation, construction, or application of the Constitution, any statute, rule, regulation, program, policy, or other law whose enforcement, application, or administration is within the responsibility of the Attorney General or such officer.

[3] U.S. CONST. art. II, § 3.

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

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

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 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]

CONCERNS WITH H.R. 3973

I. H.R. 3973 IS A FUNDAMENTALLY FLAWED SOLUTION TO A NON-EXISTENT PROBLEM

An initial problem with H.R. 3973 is that it is based on the false premise that President 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. 3973'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.[8] 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.[9] 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.[10] The modified charging guidelines direct prosecutors to charge certain low-level, nonviolent drug offenders with offenses that do not trigger mandatory minimum sentences.[11]

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

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[6] *Id.* at 832.

[7] Kate M. Manuel & Todd Garvey, *Prosecutorial Discretion in Immigration Enforcement: Legal Issues,* Congressional Research Service Report for Congress, 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] *See generally* Enforcing Constitutional Duty Hearing; Faithfully Execute Hearing.

[9] *Id.*

[10] *See* Enforcing Constitutional Duty Hearing.

[11] 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.

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 Department's longstanding administrative authority to grant transition relief when implementing legislation like the ACA. Administrative authority is granted by section 7805(a) of the Internal Revenue Code." [12] Section 7805(a) provides that "the Secretary [of the Treasury] shall prescribe all needful rules and regulations for the enforcement of this title." [13]

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." [14] 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.[15]

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." [16] 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." [17] He also noted that such discretionary enforcement decisions were routine and were too numerous to count.[18]

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

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[12] 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"].

[13] 26 U.S.C. § 7805 (2014).

[14] Mazur Letter at 2.

[15] *Id.*

[16] 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"].

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

[18] *Id.*

as 2012 in its decision in *Arizona v. United States.*[19] As both Representative Luis Gutierrez (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 the law for an entire class of people.[20] 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."[21] In fact, Congress expressly directed the Secretary of Homeland Security to establish "national immigration enforcement policies and priorities."[22] 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.[23] 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.[24]

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,

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[19] 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.

[20] Enforcing Constitutional Duty Hearing.

[21] 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.

[22] 6 U.S.C. § 202 (2014).

[23] CRS Immigration Report at 1.

[24] *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.

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. 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.[25]

In short, the examples that the proponents of H.R. 3973 cite to justify its burdensome new reporting requirement 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. 3973 RAISES SERIOUS SEPARATION-OF-POWERS CONCERNS

H.R. 3973 may pose as-applied political question problems. In a memorandum to House Judiciary Committee Democratic staff analyzing H.R. 3973, Professor Laurence Tribe of Harvard Law School noted that the practical effect of the bill would be analogous to expanding the Administrative Procedure Act[26] to require the Attorney General to submit a reasoned report every time any executive agency exercised its discretion not to enforce a statute.[27] Requiring the executive branch to explain its decision not to enforce a statute, he noted, may, in many circumstances, pose serious problems of judicial enforcement.[28]

Professor Tribe used the hypothetical example of regime change developments in Ukraine and Egypt. Section 508 of the Foreign Assistance Act[29] prohibits the executive branch from spending funds to assist a country whose leader was deposed in a coup. The State Department has yet to announce whether these developments in Ukraine or Egypt are coups, and thus has not yet enforced the Act. Nevertheless, the practical effect of H.R. 3973 would be to require either the State Department to make such an announcement or the Attorney General to issue a section 530D report explaining why the State Department was not enforcing the Foreign Assistance Act.[30] Should the Attorney General or Secretary of State remain silent, a court would rightfully be loath to involve itself in enforcing the reporting requirement under H.R. 3973.[31] Indeed, under the var-

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[25] Enforcing Constitutional Duty Hearing (Schroeder statement at 7).
[26] 5 U.S.C. §§ 551–59, 701–06, 1305, 3105, 3344, 5372, 7521 (2014).
[27] Memorandum from Laurence H. Tribe to Democratic Staff of the House Judiciary Committee 2 (Mar. 3, 2014) (on file with H. Committee on the Judiciary, Democratic Staff) [hereinafter "Tribe memo"].
[28] *Id.*
[29] Pub. L. No. 87–195, 75 Stat. 424–2 (1961).
[30] Tribe memo at 3.
[31] *Id.*

ious factors outlined by the Supreme Court in *Baker v. Carr* for determining whether an issue is a political question that is inappropriate for judicial determination, a court would likely determine that enforcing section 530D in the context of foreign affairs would present a clear political question.[32]

To highlight this flaw in the bill, Ranking Member John Conyers, Jr. (D-MI) offered an amendment to clarify that the conduct of foreign affairs is outside the bill's scope. As he explained, by applying this legislation to the State Department, it "would put our Nation in the untenable position of being forced to disclose certain critical legal and policy positions to other nations—including our enemies—when it is not in our best interest to do so."[33] Unfortunately, his amendment failed by a party-line vote of 11 to 18.

Beyond the foreign affairs context, H.R. 3973 would pose problems. The mere requirement that the executive branch report on whether it plans to enforce a law touches on what Justice Scalia has called the "'common law' of judicial review of agency action."[34] Courts frequently fail to discipline the executive branch when a decision involves "a sensitive and inherently discretionary judgment call, . . . the sort of decision that has traditionally been nonreviewable, . . . [and decisions for which] review would have disruptive practical consequences."[35] While this would present an as-applied as opposed to a facial problem for H.R. 3973, it is worth noting the possibility of future concern.

III. IMPLEMENTATION OF H.R. 3973 WILL CAUSE CONFUSION AND DRAIN ALREADY-LIMITED RESOURCES

H.R. 3973 poses substantial practical difficulties. The bill expands 28 U.S.C. § 530D's reporting requirement to include any purported non-enforcement policy of any Federal officer, but does not define the term "federal officer." In *Buckley v. Valeo,* the Supreme Court defined "Officers of the United States" to include "any appointee exercising significant authority pursuant to the laws of the United States."[36] Under that definition, the set of Federal officers may number in the hundreds, if not the thousands. Because H.R. 3973 does not define "federal officer," the statute might be read to encompass all "Officers of the United States" under Article II of the Constitution. Thus, H.R. 3973 could conceivably reach routine enforcement decisions by a low-level Federal officer. Nevertheless, H.R. 3973 would require the Attorney General to monitor *every* ex-

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[32] *Id.;* Baker v. Carr, 369 U.S. 186 (1962). The Court outlined the factors for determining when a question was political and, therefore, not appropriate for decision by a court:

> 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.

Id. at 217.

[33] Unofficial Tr. of Markup of H.R. 3973, the "Faithful Execution of the Law Act of 2014," by the H. Comm. on the Judiciary, 113th Cong. (Mar. 5. 2014).

[34] Webster v. Doe, 486 U.S. 592, 608 (1988) (Scalia, J., dissenting).

[35] *Id.* at 609 (internal quotation marks and citations omitted).

[36] 424 U.S. 1, 126 (1976).

ecutive branch agency to find and report *all* instances in which a Federal officer adopts a policy-formal or informal-to refrain from enforcing any Federal statute, rule, or regulation. That task could prove quite onerous, if not impossible.

In terms of what is meant under the amended statute by a "policy" not to enforce, to the extent that H.R. 3973's proponents mean to limit its reporting requirement to those instances where an executive branch official decides entirely not to enforce a provision of law, it may be less problematic. If, however, the bill's proponents mean to include cases like the DACA program, which was an exercise in enforcement discretion, then the bill would require officials to report the reason to Congress anytime they decide not to enforce a provision of law in a set of cases. But, as Professor Schroeder's testimony showed, executive branch officials never have sufficient resources to enforce the laws in each and every case to which they would apply. If they have to report to Congress every time they prioritize some classes of cases over others in allocating scarce resources, their resources will be even further stretched, and enforcement of the law will suffer.

IV. THERE WAS AN ALMOST COMPLETE ABSENCE OF GENUINE DELIBERATIVE PROCESS

Further calling into question the soundness of H.R. 3973 is the fact that the Committee did not thoroughly vet it. The Committee failed to hold a single legislative hearing on this bill and did not hold any Subcommittee markup of the bill. Finally, this Report is being filed less than two days after the full Committee markup of the bill—which itself was perfunctory—and without a budgetary impact estimate from the Congressional Budget Office. In the absence of any thorough consideration of the bill's provisions and its potential real-world implications, it is no surprise that the bill is vague and perhaps broader in scope than its authors intended.

CONCLUSION

H.R. 3973 is an ill-considered and deeply flawed bill. It is based on the false premise that President Obama has violated his constitutional duty to "take care" that he "faithfully" execute the laws. None of the examples that the bill's proponents rely on constitute a failure to execute the law. Rather, they are all examples of the President's exercise of his authority to use discretion in enforcing the law, which stems from the very "take care" clause that the bill's proponents claims he is violating. Moreover, H.R. 3973 can present serious separation-of-powers concerns in specific contexts whereby a court may be drafted into deciding questions that the Constitution reserves for the political branches or for which a court is otherwise ill-equipped to decide. Finally, H.R. 3973 imposes an incredibly large practical burden on the Attorney General to monitor the activities of potentially thousands of executive branch officers and make determinations as to whether their routine discretionary decisions amount to a "policy" of non-enforcement. Particularly in light of the fact that this bill does not provide extra resources to carry out its requirements, this burden will inevitably divert limited resources away from the Justice Department's core law enforcement function.

For all of the foregoing reasons, we strongly urge our colleagues to oppose H.R. 3973.

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