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.

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[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,

[3] U.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,

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[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

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[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 (1957)).

[15] 521 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-

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[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 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

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[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.

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[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

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[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."

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[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.
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> . . .
>
> 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

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[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

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[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]

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[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,

Continued

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

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

[61] Jennifer 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.

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JERROLD NADLER.
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SHEILA JACKSON LEE.
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