THE REPUBLICAN STUDY COMMITTEE
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Legislative Bulletin……July 30, 2014

Contents:

H. Res. 676 — Providing for authority to initiate litigation for actions by the President or other executive branch officials inconsistent with their duties under the Constitution of the United States (Sessions, R-TX)

Order of Business: H. Res. 676 is expected to be considered on the House floor on July 30, 2014. The Rules Committee is meeting at 3:00 on July 29, 2014, to consider a rule for H. Res. 676. A closed rule is expected.

Summary: H. Res. 676 authorizes the Speaker of the House of Representatives to initiate or intervene in civil action on behalf of the House of Representatives in Federal court against the President and any other executive branch employee, including the head of an agency, to seek appropriate relief regarding their failure to act in a manner consistent with their official duties in implementing the Affordable Care Act (Obamacare).

The Office of General Counsel of the House of Representatives will represent the House at the direction of the Speaker and is authorized to hire outside counsel for this purpose.

The Committee on House Administration will print the total amount spent on outside counsel in the Congressional Record each quarter.

Additional Background:

Obamacare Implementation: The President and his Administration have failed to implement their signature law as it was written by the Democrat-controlled Congress. CRS has a report on the delays and extensions to the law unilaterally undertaken by the Administration. According to the Speaker, the lawsuit will focus on the Administration's failure to implement the employer mandate.

Employer Mandate – What the Law Says: Under current law, Obamacare requires large employers to offer full time employees and their dependents government-approved employer-sponsored health insurance. The law specifically states that the effective date for this

requirement begins after December 31, 2013. This requirement is officially called the "Shared Responsibility For Employers Regarding Health Insurance."

A large employer is defined as one that employs 50 or more full-time equivalent (employed for an average of 30 or more hours per week) employees in the preceding year. The penalty for non-compliance in 2014 is up to a $3,000-per-employee assessment. Obamacare also required extensive reporting requirements from employers regarding compliance with the employer mandate.

For additional background, see the CRS report: Potential Employer Penalties Under the Patient Protection and Affordable Care Act (ACA).

Employer Mandate – Administration's First Delay: On July 2, 2013, the Administration announced it was delaying the effective date of the employer mandate by one year via two short blog posts.

Specifically, the Administration suspended the employer reporting requirements until 2015. Because the employer penalties are tied to the reporting, the penalties were also delayed until 2015. The blog posts do not identify statutory authority for this action.

For additional background, see the CRS report: Obama Administration Delays Implementation of ACA's Employer Responsibility Requirements: A Brief Legal Overview

Employer Mandate – Administration's Second Delay: On February 10, 2014, the Administration issued another delay in the employer mandate.

Under the Administration's new regulations, the penalty payments do not apply until 2016 for employers with between 50 and 99 employees. In addition to this outright delay of the mandate for certain companies, the Administration also made a number of changes to the mandate in direct contravention of the law:

- Employers with over 100 employees will only face a penalty payment in 2015 if they fail to cover at least 70 percent of their employees.
- In 2015, employers can determine if they have the required number of full time equivalent employees by using a reference period of at least six months instead of a full year.
- Employers will not be required to provide coverage for dependents of full time employees in 2015.

The Treasury Department even states that it will consider extending these delays beyond 2015. Once again, the Administration did not identify statutory authority for this action.

Employer Mandate – Congressional Action: In response to the Administration's action, the House considered and passed H.R. 2667, the Authority for Mandate Delay Act by a 264 – 161 vote on July 17, 2013. This legislation would statutorily change the effective date of the

employer mandate payments and reporting requirements from after December 31, 2013 to after December 31, 2014.

Pursuant to the rule for consideration of this legislation, the Clerk added the text of H.R. 2667 as new matter at the end of H.R. 2668, the Fairness for American Families Act, which was also passed by the House on July 17, 2013. H.R. 2668 (including the text of H.R. 2667) has remained pending before the Senate for the last year. The Senate has not approved any legislation to delay the employer mandate. The President said that he would veto H.R. 2667.

For more information, see the RSC's Legislative Bulletin on H.R. 2667.

Take Care Clause: Article II, Section 3 of the Constitution lays out the duties of the President. The Take Care Clause requires that the President "*shall take Care that the Laws be faithfully executed*." The House Judiciary Committee held hearings on this issue on December 3, 2013, titled "The President's Constitutional Duty to Faithfully Execute the Laws," and on February 26, 2014, titled "Enforcing the President's Constitutional Duty to Faithfully Execute the Laws." The Heritage Guide to the Constitution and CRS's Constitution Annotated have further background.

Standing: A crucial question for the courts to answer is if the House of Representatives has the legal authority, called standing, to have this lawsuit decided in court.

The Supreme Court has established a number of tests to determine if a plaintiff has standing:

1. The plaintiff must allege a personal injury that is concrete and particularized.
2. The injury must be fairly traceable to the defendant.
3. The injury must be likely to be redressed by a favorable court decision to provide the requested relief.

Courts have been reluctant to intervene in controversies between the other two branches of the federal government, preferring that the political branches use other remedies to achieve the desired outcome. In rejecting a recent lawsuit from Senator Ron Johnson regarding Obamacare subsidies for Members of Congress due to a lack of standing, a federal judge wrote: "it is not true that the courts are the only remedy for the Administration's alleged unlawfulness. The Congress itself is surely not helpless to rein in the executive: it has spending authority, investigative powers, and it even wields the blunt instrument of impeachment; it has the power to pass, delay, or kill initiatives the executive branch might propose; and it may delay or thwart consideration of executive branch nominees."

Obtaining standing is widely considered to be one of the biggest obstacles in obtaining a favorable ruling in the lawsuit authorized by H. Res. 676. For additional background, see CRS reports: Does the House of Representatives Have Standing to Sue the President? and Congressional Participation in Article III Courts: Standing to Sue.

Does the House Have Standing in this Case?: Legal experts have disagreed whether the House will meet the requirements for standing in this lawsuit.

In testimony before the House Rules Committee, law professor Elizabeth Foley described a four-part roadmap to obtain standing in this case. Professor Foley believes that the lawsuit authorized by the Resolution satisfies these requirements:

1. Explicit legislative authorization.
2. No private plaintiff available.
3. No political "self-help" available.
4. "Nullification" of institutional power injury.

Former Assistant Attorney General and Acting Solicitor General Walter Dellinger testified that "because neither the Speaker nor even the House of Representatives has a legal concrete, particular and personal stake in the outcome of the proposed law suits, federal courts would have no authority to entertain," this lawsuit.

Standing as an Institution: The Supreme Court decided in the 1997 case *Raines v. Byrd* that individual Members of Congress lacked standing to challenge the Line Item Veto Act because they did not suffer a "personal, particularized, and concrete injury."

However, one or both houses of Congress acting as an institution may have standing. In 2008, the House passed (by a 223 – 32 vote, 163 Republicans abstained from voting) a resolution authorizing the Committee on the Judiciary to initiate a civil lawsuit against the Bush White House regarding the enforcement of subpoenas against Harriet Miers and Joshua Bolten. In the subsequent case, *Committee on the Judiciary, U.S. House of Representatives v. Miers*, a federal court ruled that the Committee on the Judiciary on behalf of the House as an institution had standing.

To establish that the House of Representatives as an institution is bringing this action, the Speaker has indicated that after the full House votes to pass H. Res. 676, the Bipartisan Legal Advisory Group (BLAG) will direct the General Counsel to initiate legal proceedings.

Bipartisan Legal Advisory Group (BLAG): The Bipartisan Legal Advisory Group is a five-Member panel consisting of the Speaker of the House, Majority Leader, Majority Whip, Minority Leader, and Minority Whip. The BLAG acts by a majority vote of the group.

As described in a filing by the BLAG, "the United States House of Representatives has articulated its institutional position in litigation matters through a five-member bipartisan leadership group since at least the early 1980's (although the formulation of the group's name has changed somewhat over time). Since 1993, the House rules have formally acknowledged and referred to the Bipartisan Legal Advisory Group, as such, in connection with its function of providing direction to the Office of the General Counsel."

Rule II (8) of the Rules of the House requires the Office of General Counsel to act on direction of the Speaker, in consultation with the BLAG.

In 2011, the Speaker convened the BLAG to initiate action in the courts when the Administration decided to not defend the Defense of Marriage Act (DOMA). The Supreme Court granted standing to the BLAG to defend DOMA in that case.

For further additional background see:

- Opinion piece from Speaker Boehner on CNN, Why We Must Now Sue the President.
- Key Points backgrounder from Speaker Boehner.
- Memo to House Colleagues on the Separation of Powers from Speaker Boehner.
- An article from legal experts David B. Rivkin Jr. and Elizabeth Price Foley.
- Report from the Majority Leader on the Imperial Presidency.

Committee Action: A draft version of the Resolution was released on July 10, 2014. The Rules Committee held a hearing on July 16, 2014, where four legal experts testified. The Rules Committee marked up and reported H. Res. 676 by a 7-4 vote on July 24, 2014.

Outside Groups:

The Heritage Foundation released a legal memo on the lawsuit.

Administration Position: Although the Administration has not released an official SAP on H. Res. 676, President Obama stated shortly after Speaker Boehner announced the lawsuit: "Middle-class families can't wait for Republicans in Congress to do stuff… So sue me. As long as they're doing nothing, I'm not going to apologize for trying to do something."

Cost to Taxpayers: No CBO score is available.

Does the Bill Expand the Size and Scope of the Federal Government?: No.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: No.

Does the Bill Contain Any Federal Encroachment into State or Local Authority in Potential Violation of the 10th Amendment?: No.

Does the Bill Delegate Any Legislative Authority to the Executive Branch?: No, H. Res. 676 will authorize a lawsuit that is meant to reclaim the Congress's Article I legislative powers from the President and force the President to uphold his Article II responsibilities.

Does the Bill Contain Any Earmarks/Limited Tax Benefits/Limited Tariff Benefits?: No.

Constitutional Authority: Constitutional authority statements are not required for resolutions.

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