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113TH CONGRESS *2d Session* } HOUSE OF REPRESENTATIVES { REPORT 113–

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

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JULY 28, 2014.—Referred to the House Calendar and ordered to be printed

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Mr. SESSIONS, from the Committee on Rules, submitted the following

# R E P O R T

together with

## DISSENTING VIEWS

[To accompany H. Res. 676]

The Committee on Rules, to whom was referred the resolution (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, having considered the same, reports favorably thereon with an amendment and recommends that the resolution as amended be adopted.

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AMENDMENT

The amendment is as follows:

Page 2, line 11 strike "The Office" and insert "(a) The Office".

Page 2, after line 16, add the following:

(b) The chair of the Committee on House Administration shall cause to be printed in the Congressional Record a statement setting forth the aggregate amounts expended by the Office of General Counsel on outside counsel and other experts pursuant to subsection (a) on a quarterly basis. Such statement shall be submitted for printing not more than 30 days after the expiration of each such period.

PURPOSE AND SUMMARY

H. Res. 676 authorizes the Speaker to initiate or intervene in one or more civil actions to seek any appropriate relief regarding the failure of the President or any other official of the executive branch to act in a manner consistent with that official's duties under the Constitution and laws of the United States with respect to implementation of the Patient Protection and Affordable Care Act and related statutes. The resolution also requires the Speaker notify the House upon his decision to pursue litigation pursuant to the resolution. Further, the Office of the General Counsel will represent the House in any civil action conducted pursuant to this resolution and is authorized to employ outside counsel or other experts for this litigation, if needed. Finally, the resolution provides that the chair of the Committee on House Administration place in the Congressional Record quarterly statements showing the aggregate amounts expended on outside counsel or experts during each quarter.

BACKGROUND AND NEED FOR LEGISLATION

The evidence gathered during the Committee's hearing process demonstrates that the President has failed on numerous occasions to fulfill his duty under Article II, section 3 of the Constitution of the United States to faithfully execute the laws passed by Congress. He has ignored certain statutes completely, selectively enforced others, and bypassed the legislative process to create his own laws by executive fiat. These unilateral actions have led to a shift in the balance of power in favor of the presidency, challenging Congress' ability to effectively represent the American people.

Such a shift in power should alarm Members of both political parties because it threatens the very institution of the Congress. On July 16, 2014, in his testimony before the Committee on Rules, Professor Jonathan Turley warned the Committee that "* * * the arguments that are being made today [by this Administration] could be used [by the next President] to nullify or suspend or change environmental laws * * * That is what happens when you have an über-presidency."A lawsuit on behalf the House of Representatives is a direct and proportionate response to the alarming increase in executive actions that have usurped the House's lawmaking authority under Article I of the Constitution. Critics of the litigation have argued that the House could attempt to use tools otherwise available to the legislative branch to remedy executive

encroachment into legislative powers. However, those options are inappropriate remedies to address the President's unilateral actions, as none of them force the President to reverse course. One suggestion was to defund agencies or legislate again "for emphasis". However, the Founders never intended that Congress legislate twice just to ensure its laws have meaning.

Much has been made of whether the House would be granted standing by the court to litigate the merits of the case. The minority has pointed to a few cases in which one Member of Congress or a small group of Members have not been granted standing. Those cases can be distinguished from the litigation contemplated by H. Res. 676. The resolution, if adopted, signifies that the House has, by an affirmative vote by a majority of its Members, explicitly authorized the litigation to defend its role in our tripartite system.

The courts have recognized and utilized their constitutional role in upholding the separation of powers between the legislative branch and the executive branch since *Marbury* v. *Madison*. A House of Congress is the natural and appropriate plaintiff to urge the courts to enforce the separation of powers. If the courts were to deny standing, the President's power would go unchecked. Such a ruling would invite this President and his successors to seize even more congressional authority at the expense of the Constitution that all Members of Congress—and the President—took an oath to defend.

## CONSTITUTIONAL BASIS FOR THE SUIT

### Separation of Powers Protects Liberty

The Constitution limits the reach of the three branches of government, ensuring that no branch encroaches upon the others' authority. Simply put, Congress makes the law, the President enforces the law, and the Judiciary interprets the law. The bedrock of the Constitution remains the separation of powers. Professor Turley testified before the House Judiciary Committee on February 26, 2014 that " [t]he policing of the lines of separation is the single most important duty of the courts since the separation of powers was designed as a protection of individual liberty. It is the concentration of authority in any one branch that threatens individual rights."

The President—a constitutional law professor himself—understood this point well. At the 2008 Saddleback Presidential Candidates Forum, then-Senator Obama stated that "[o]ne of the most important jobs of * * * the Supreme Court is to guard against the encroachment of the Executive Branch on * * * the power of the other branches. And, I think [the Chief Justice] has been a little bit too willing and eager to give an administration, whether it's mine or George Bush's, more power than I think the Constitution originally intended."

## The Take Care Clause and its Historical Role in Guarding Against Tyranny

The separation of powers laid out in the Constitution reflects the Framers' fear of an exceedingly powerful executive. They did not want a repeat of English history in which the Monarchy was able to suspend laws without Parliament's consent. The very first article of the English Bill of Rights, which served as a template for our Constitution, stated that "the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of parliament, is illegal."

Article II, section 3 of the Constitution, known as the "Take Care Clause," limits the President's power by providing that he "shall take Care that the Laws be faithfully executed." The clause imposes an affirmative duty on the President, not a discretionary power. Professor Michael W. McConnell of Stanford Law School noted in a July 8, 2013 Wall Street Journal article that it acts as a check on the "Vesting Clause", which gives the President discretion about how to enforce the law, not whether to do so.

The Take Care Clause requires the President to enforce all constitutionally valid laws, regardless of his view of their wisdom. Indeed, the Justice Department's Office of Legal Counsel (OLC), which advises the President, has opined correctly over the years that the President has no authority to "refuse to enforce a statute he opposes for policy reasons." Professor McConnell pointed out in his article that, "Attorneys general under Presidents Carter, Reagan, both Bushes and Clinton all agreed on this point."

## Executive Overreach by the President

In his State of the Union address, the President put Congress and the American people on notice that this would be his "year of action" to implement his own policies "with or without Congress." On January 14, 2014, at his first cabinet meeting of the year, he said he would use the "pen and the phone" to do so, thereby ignoring his own passionate defense of Congress' authority.

There has been a history of increasing executive overreach throughout recent history, yet, according to Professor Turley's testimony before the Committee on Judiciary, "it has accelerated at an alarming rate" under President Obama. Professor McConnell explained in the Wall Street Journal that, "[w]ith the exception of Richard Nixon, whose refusals to spend money appropriated by Congress were struck down by the courts, no prior president has claimed the power to negate a law that is concededly constitutional." Yet that is exactly what this President has done.

The following list of examples of executive overreach is not exhaustive but demonstrates the breadth of encroachment across a wide spectrum of policy areas:

● *Affordable Care Act*—The President has nullified several major provisions of the Affordable Care Act (ACA). One group of experts from the Galen Institute has identified 23 instances in which the President has unilaterally altered the ACA. These unlawful modifications include the following examples:

The employer mandate was delayed twice, on July 2, 2013 and again on February 10, 2014. The Treasury Department created a new category of employers not included in statute when it announced that employers with 50–99 employees would be given until 2016—two years longer than stated in law—before they would face a penalty for failing to comply with the ACA. It also announced that companies with 100 workers or more would avoid a fine if they offered insurance to 70 percent of their full time employees, which is far less than envisioned by the ACA. The Administration also delayed the employer reporting requirements, which are needed to effectively administer the employer mandate, the individual mandate, and the premium tax credits. As a result, the HHS inspector General reported that there were 2.6 million unresolved inconsistencies because "the eligibility system was not fully operational."

Following the July 2013 delay of the mandate and reporting requirements, the House passed H.R. 2667, the Authority for Mandate Delay Act, to codify the President's unilateral action. However, the President threatened to veto the bill because it was "unnecessary," and the Senate has failed to consider it.

Moreover, the President instructed States and health insurers that they are free, in some instances, to ignore the ACA's clear language regarding obligatory coverage requirements. The ACA states that these coverage requirements were to go into effect on January 1, 2014. On November 14, 2013, President Obama made this announcement despite imminent House consideration of H.R. 3350, the Keep Your Health Plan Act of 2013, to allow people to keep their existing coverage. The President threatened to veto H.R. 3350 despite the fact that it codified part of the President's unilateral action. The Senate has failed to consider H.R. 3350.

- *Transfer of the Taliban Five*—The President failed to provide the statutorily required advance notice to Congress of the transfer of five senior Taliban commanders detained at Guantanamo Bay in exchange for the release of Army Sergeant Bowe Bergdahl, who was held in captivity by the Taliban. Section 1035(d) of the National Defense Authorization Act of 2014 provides that the Secretary of Defense must notify the appropriate committees of Congress not later than 30 days before the transfer or release of a detainee. The President's failure to provide the appropriate committees with 30-days' notice violated the law's clear statutory text.
- *DREAM Act*—While Congress was debating reforms that could affect unlawful immigrants who were brought to this country as children, the President, through a memorandum from the Department of Homeland Security, unilaterally enacted his version of the DREAM Act by ordering officials to defer action on deportation for certain children. He did so even though he had previously gone on record to say that such a move would be outside his constitutional authority.

● *No Child Left Behind*—Rather than work with Congress to enact permanent changes to the No Child Left Behind education law, the President unilaterally waived its accountability provisions. In doing so, he created a list of requirements to qualify for the waiver, essentially rewriting the law. In announcing the move to grant two additional waivers in a July 6, 2012 press release, the Department of Education cited "congressional inaction" as the reason for which it acted unilaterally.

● *Temporary Assistance for Needy Families*—When the President objected to the Federal Temporary Assistance for Needy Families work requirements in the bipartisan welfare reform law, he informed States they could seek waivers of these requirements even though the law says they cannot be waived. The Government Accountability Office concluded that prior Administrations as well as the Obama Administration had earlier determined that they had no authority to waive the work requirements given that the 1996 welfare reform ended welfare waivers, specifically saying all states had to follow the new work requirements.

The Supreme Court has Recently Rebuffed Executive Overreach

The President's unilateral actions have been rebuffed by the Supreme Court in the Hobby Lobby case, the recess appointments case, and *U.A.R.G.* v. *E.P.A.* See *Burwell* v. *Hobby Lobby*, 13-354, 2014 WL 2921709 (U.S. June 30, 2014); *N.L.R.B.* v. *Noel Canning*, 12-1281, 2014 WL 2882090 (U.S. June 26, 2014). In a prominent case involving the Environmental Protection Agency, the Supreme Court found that the executive's desire to improve a law did not justify rewriting it. "The power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law's administration. But it does not include a power to revise clear statutory terms that turn out not to work in practice." *Util. Air Regulatory Grp.* v. *E.P.A.*, 134 S. Ct. 2427, 2446 (2014). These cases had private plaintiffs that suffered an injury as a result of executive overreach and thus had standing to sue. In cases where there is no natural private plaintiff, only a House of Congress can urge the judicial branch to intervene.

## CONSTITUTIONAL STANDING

The Judiciary often hesitates to involve itself in controversies between the two political branches, going so far as to create the "political question doctrine" to avoid such disputes. The doctrine reduces litigation by making it difficult for Members of Congress or the President to file frivolous lawsuits whenever they are merely displeased with the actions of another branch. While courts often look suspiciously at inter-branch suits, they must maintain their constitutional duty to enforce the separation of powers as provided in *Marbury* v. *Madison*.

In addition to the political question doctrine, courts have used standing to avoid hearing the merits of inter-branch suits. The standing requirement flows from Article III, section 2 of the Constitution, which limits Federal judicial power to certain kinds of

"cases" and "controversies." In order to have a "case" or "controversy" within the meaning of Article III, the Supreme Court has identified three standing elements: (1) an injury-in-fact (2) caused by the defendant's conduct that (3) can be redressed by the court. In addition, courts use prudential factors in weighing whether to grant congressional standing.

One constitutional scholar, reasoning that the second and third constitutional standing elements will likely be non-issues, has made the case for congressional standing under a scenario that addresses the "injury-in-fact" element.

In her testimony before the Rules Committee on July 16, 2014, Professor Elizabeth Price Foley of the Florida International University School of Law stated that in her reading of the case law, the House would have Article III standing if it (a) were acting as an institution rather than a small group of aggrieved Members and (b) if it suffered an institutional injury in the sense that the President's executive action caused Congress' vote on a particular issue to be "nullified." In addition, Professor Foley stated that the courts will likely analyze whether "prudential factors" bolster or weaken the case for granting congressional standing. These factors include: (a) whether the institution has explicit authorization to bring the lawsuit; (b) whether there has been a "benevolent suspension" of law in which no private plaintiff has been harmed and in which case only Congress would have standing; and (c) whether the legislature has exhausted its legislative remedies against the executive.

## CONCLUSION

This resolution authorizes the Speaker, on behalf of the House, to take legal action against the President or other executive branch officials for failing to faithfully execute the law with respect to the implementation of the Patient Protection and Affordable Care Act and related statutes. The alarming increase in executive overreach has made such litigation necessary. House-authorized litigation serves as a direct and proportionate response to unilateral executive actions that have diluted Congress' Article I power. Congress is the sole entity entrusted by the Framers with power to make law, as it is the body closest to the people by virtue of elections that take place every two years. This resolution seeks to protect Congress' constitutional prerogative and asks the Court to fulfill its duty to guard the lines of separation between the branches as it has done since *Marbury* v. *Madison*.

## HEARINGS

On July 16, 2014, the Committee on Rules held a legislative hearing on a draft committee print of H. Res. _____, providing for authority to initiate litigation for actions by the President inconsistent with his duties under the Constitution of the United States. The purpose of the hearing was to receive testimony from outside experts on the separation of powers under the Constitution and the operation of the proposed resolution. The following witnesses testified: Walter E. Dellinger III, Partner, O'Melveny & Myers LLP; Elizabeth Price Foley, Professor of Law, FIU College of Law; Simon

Lazarus, Senior Counsel, Constitutional Accountability Center; and Jonathan Turley, J.B. & Maurice C. Shapiro Professor of Public Interest Law, George Washington University Law School.

A modified version of the resolution was later introduced by Mr. Sessions on July 22, 2014 as H. Res. 676.

## COMMITTEE CONSIDERATION

The Committee on Rules met on July 24, 2014 in open session and ordered H. Res. 676, as amended, favorably reported to the House by a record vote of 7 yeas and 4 nays, a quorum being present.

## COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee to list the record votes on the motion to report legislation and amendments thereto. A motion by Ms. Foxx to report the resolution, as amended, to the House with a favorable recommendation was agreed to by a record vote of 7 yeas and 4 nays, a quorum being present. The names of Members voting for and against follow:

### ROLL CALL VOTE NO. 169

### H. RES. 676 (ORIGINAL JURISDICTION)

Date: July 24, 2014.

Motion by Ms. Foxx to report the resolution, as amended, to the House with a favorable recommendation.

Agreed to, as amended: 7 yeas and 4 nays.

| Representative | Yea | Nay | Representative | Yea | Nay |
|---|---|---|---|---|---|
| Ms. Foxx, Vice Chairman | X | | Ms. Slaughter, Ranking Member | | X |
| Mr. Bishop | | | Mr. McGovern | | X |
| Mr. Cole | X | | Mr. Hastings | | X |
| Mr. Woodall | X | | Mr. Polis | | X |
| Mr. Nugent | X | | | | |
| Mr. Webster | X | | | | |
| Ms. Ros-Lehtinen | | | | | |
| Mr. Burgess | X | | | | |
| Mr. Sessions, Chairman | X | | | | |
| | | | **Vote Total:** | **7** | **4** |

The committee also considered the following amendments on which record votes were requested. The names of Members voting for and against follow:

ROLL CALL VOTE NO. 158

H. RES. 676 (ORIGINAL JURISDICTION)

Date: July 24, 2014.

Amendment offered by Ms. Slaughter #2, requiring the House's General Counsel to disclose how much has been spent on the lawsuit every week.

Not Agreed to: 4 yeas and 7 nays.

| Representative | Yea | Nay | Representative | Yea | Nay |
|---|---|---|---|---|---|
| Ms. Foxx, Vice Chairman | | X | Ms. Slaughter, Ranking Member | X | |
| Mr. Bishop | | | Mr. McGovern | X | |
| Mr. Cole | | X | Mr. Hastings | X | |
| Mr. Woodall | | X | Mr. Polis | X | |
| Mr. Nugent | | X | | | |
| Mr. Webster | | X | | | |
| Ms. Ros-Lehtinen | | | | | |
| Mr. Burgess | | X | | | |
| Mr. Sessions, Chairman | | X | | | |
| | | | **Vote Total:** | **4** | **7** |

ROLL CALL VOTE NO. 159

H. RES. 676 (ORIGINAL JURISDICTION)

Date: July 24, 2014.

Amendment offered by Ms. Slaughter #3, prohibiting the hiring of any law firms or consultants who lobby Congress.

Not Agreed to: 4 yeas and 7 nays.

| Representative | Yea | Nay | Representative | Yea | Nay |
|---|---|---|---|---|---|
| Ms. Foxx, Vice Chairman | | X | Ms. Slaughter, Ranking Member | X | |
| Mr. Bishop | | | Mr. McGovern | X | |
| Mr. Cole | | X | Mr. Hastings | X | |
| Mr. Woodall | | X | Mr. Polis | X | |
| Mr. Nugent | | X | | | |
| Mr. Webster | | X | | | |
| Ms. Ros-Lehtinen | | | | | |
| Mr. Burgess | | X | | | |
| Mr. Sessions, Chairman | | X | | | |
| | | | **Vote Total:** | **4** | **7** |

ROLL CALL VOTE NO. 160

H. RES. 676 (ORIGINAL JURISDICTION)

Date: July 24, 2014.

Amendment offered by Ms. Slaughter #4, prohibiting the hiring of any law firm or consultant who lobbies on Affordable Care Act implementation or has any financial stake in implementation of the Affordable Care Act to avoid a conflict of interest.

Not Agreed to: 4 yeas and 7 nays.

| Representative | Yea | Nay | Representative | Yea | Nay |
|---|---|---|---|---|---|
| Ms. Foxx, Vice Chairman | | X | Ms. Slaughter, Ranking Member | X | |
| Mr. Bishop | | | Mr. McGovern | X | |
| Mr. Cole | | X | Mr. Hastings | X | |
| Mr. Woodall | | X | Mr. Polis | X | |
| Mr. Nugent | | X | | | |
| Mr. Webster | | X | | | |
| Ms. Ros-Lehtinen | | | | | |
| Mr. Burgess | | X | | | |
| Mr. Sessions, Chairman | | X | | | |
| | | | **Vote Total:** | **4** | **7** |

ROLL CALL VOTE NO. 161

H. RES. 676 (ORIGINAL JURISDICTION)

Date: July 24, 2014.

Amendment offered by Ms. Slaughter #5, requiring the lawsuit to be paid for using money from the budget of the Benghazi Select Committee.

Not Agreed to: 4 yeas and 7 nays.

| Representative | Yea | Nay | Representative | Yea | Nay |
|---|---|---|---|---|---|
| Ms. Foxx, Vice Chairman | | X | Ms. Slaughter, Ranking Member | X | |
| Mr. Bishop | | | Mr. McGovern | X | |
| Mr. Cole | | X | Mr. Hastings | X | |
| Mr. Woodall | | X | Mr. Polis | X | |
| Mr. Nugent | | X | | | |
| Mr. Webster | | X | | | |
| Ms. Ros-Lehtinen | | | | | |
| Mr. Burgess | | X | | | |
| Mr. Sessions, Chairman | | X | | | |
| | | | **Vote Total:** | **4** | **7** |

ROLL CALL VOTE NO. 162

H. RES. 676 (ORIGINAL JURISDICTION)

Date: July 24, 2014.

Amendment offered by Mr. Hastings of Florida #6, requiring that the House's lawyers explain to BLAG the likelihood of success in this lawsuit, and how they think they will overcome the legal obstacles presented by Supreme Court precedent.

Not Agreed to: 4 yeas and 7 nays.

| Representative | Yea | Nay | Representative | Yea | Nay |
|---|---|---|---|---|---|
| Ms. Foxx, Vice Chairman | | X | Ms. Slaughter, Ranking Member | X | |
| Mr. Bishop | | | Mr. McGovern | X | |
| Mr. Cole | | X | Mr. Hastings | X | |
| Mr. Woodall | | X | Mr. Polis | X | |
| Mr. Nugent | | X | | | |
| Mr. Webster | | X | | | |
| Ms. Ros-Lehtinen | | | | | |
| Mr. Burgess | | X | | | |
| Mr. Sessions, Chairman | | X | | | |
| | | | **Vote Total:** | **4** | **7** |

ROLL CALL VOTE NO. 163

H. RES. 676 (ORIGINAL JURISDICTION)

Date: July 24, 2014.

Amendment offered by Mr. Hastings of Florida #7, ensuring that the lawsuit does not seek to prevent implementation of the Affordable Care Act's provisions relating to: (1) young adult coverage; (2) benefits for women; (3) protections for pre-existing conditions; (4) small business tax credits; or, (5) prescription discounts for seniors that close the "donut hole" in Medicare.

Not Agreed to: 4 yeas and 7 nays.

| Representative | Yea | Nay | Representative | Yea | Nay |
|---|---|---|---|---|---|
| Ms. Foxx, Vice Chairman | | X | Ms. Slaughter, Ranking Member | X | |
| Mr. Bishop | | | Mr. McGovern | X | |
| Mr. Cole | | X | Mr. Hastings | X | |
| Mr. Woodall | | X | Mr. Polis | X | |
| Mr. Nugent | | X | | | |
| Mr. Webster | | X | | | |
| Ms. Ros-Lehtinen | | | | | |
| Mr. Burgess | | X | | | |
| Mr. Sessions, Chairman | | X | | | |
| | | | **Vote Total:** | **4** | **7** |

ROLL CALL VOTE NO. 164

H. RES. 676 (ORIGINAL JURISDICTION)

Date: July 24, 2014.

Amendment offered by Mr. McGovern #8, requiring disclosure of all contracts with lawyers and consultants 10 days before they are approved.

Not Agreed to: 4 yeas and 7 nays.

| Representative | Yea | Nay | Representative | Yea | Nay |
|---|---|---|---|---|---|
| Ms. Foxx, Vice Chairman | | X | Ms. Slaughter, Ranking Member | X | |
| Mr. Bishop | | | Mr. McGovern | X | |
| Mr. Cole | | X | Mr. Hastings | X | |
| Mr. Woodall | | X | Mr. Polis | X | |
| Mr. Nugent | | X | | | |
| Mr. Webster | | X | | | |
| Ms. Ros-Lehtinen | | | | | |
| Mr. Burgess | | X | | | |
| Mr. Sessions, Chairman | | X | | | |
| | | | **Vote Total:** | **4** | **7** |

ROLL CALL VOTE NO. 165

H. RES. 676 (ORIGINAL JURISDICTION)

Date: July 24, 2014.

Amendment offered by Mr. McGovern #9, ensuring that the lawsuit does not target people in the military, veterans, or civil servants.

Not Agreed to: 4 yeas and 7 nays.

| Representative | Yea | Nay | Representative | Yea | Nay |
|---|---|---|---|---|---|
| Ms. Foxx, Vice Chairman | | X | Ms. Slaughter, Ranking Member | X | |
| Mr. Bishop | | | Mr. McGovern | X | |
| Mr. Cole | | X | Mr. Hastings | X | |
| Mr. Woodall | | X | Mr. Polis | X | |
| Mr. Nugent | | X | | | |
| Mr. Webster | | X | | | |
| Ms. Ros-Lehtinen | | | | | |
| Mr. Burgess | | X | | | |
| Mr. Sessions, Chairman | | X | | | |
| | | | **Vote Total:** | **4** | **7** |

ROLL CALL VOTE NO. 166

H. RES. 676 (ORIGINAL JURISDICTION)

Date: July 24, 2014.

Amendment offered by Mr. Polis #10, requiring disclosure of where the taxpayer money paying for the lawsuit is coming from, and which programs and offices' budgets are being reduced to pay for it.

Not Agreed to: 4 yeas and 7 nays.

| Representative | Yea | Nay | Representative | Yea | Nay |
|---|---|---|---|---|---|
| Ms. Foxx, Vice Chairman | | X | Ms. Slaughter, Ranking Member | X | |
| Mr. Bishop | | | Mr. McGovern | X | |
| Mr. Cole | | X | Mr. Hastings | X | |
| Mr. Woodall | | X | Mr. Polis | X | |
| Mr. Nugent | | X | | | |
| Mr. Webster | | X | | | |
| Ms. Ros-Lehtinen | | | | | |
| Mr. Burgess | | X | | | |
| Mr. Sessions, Chairman | | X | | | |
| | | | **Vote Total:** | **4** | **7** |

ROLL CALL VOTE NO. 167

H. RES. 676 (ORIGINAL JURISDICTION)

Date: July 24, 2014.

Amendment offered by Mr. Polis #11, requiring the House to bring up, debate, and vote on bipartisan comprehensive immigration reform.

Not Agreed to: 4 yeas and 7 nays.

| Representative | Yea | Nay | Representative | Yea | Nay |
|---|---|---|---|---|---|
| Ms. Foxx, Vice Chairman | | X | Ms. Slaughter, Ranking Member | X | |
| Mr. Bishop | | | Mr. McGovern | X | |
| Mr. Cole | | X | Mr. Hastings | X | |
| Mr. Woodall | | X | Mr. Polis | X | |
| Mr. Nugent | | X | | | |
| Mr. Webster | | X | | | |
| Ms. Ros-Lehtinen | | | | | |
| Mr. Burgess | | X | | | |
| Mr. Sessions, Chairman | | X | | | |
| | | | **Vote Total:** | **4** | **7** |

ROLL CALL VOTE NO. 168

H. RES. 676 (ORIGINAL JURISDICTION)

Date: July 24, 2014.

Amendment offered by Ms. Slaughter #12, striking language regarding "any other related provision of law".

Not Agreed to: 4 yeas and 7 nays.

| Representative | Yea | Nay | Representative | Yea | Nay |
|---|---|---|---|---|---|
| Ms. Foxx, Vice Chairman | | X | Ms. Slaughter, Ranking Member | X | |
| Mr. Bishop | | | Mr. McGovern | X | |
| Mr. Cole | | X | Mr. Hastings | X | |
| Mr. Woodall | | X | Mr. Polis | X | |
| Mr. Nugent | | X | | | |
| Mr. Webster | | X | | | |
| Ms. Ros-Lehtinen | | | | | |
| Mr. Burgess | | X | | | |
| Mr. Sessions, Chairman | | X | | | |
| | | | **Vote Total:** | **4** | **7** |

The following amendment was disposed of by a voice vote:

Amendment offered by Mr. Nugent #1, requiring that the chair of the Committee on House Administration on a quarterly basis place a statement in the Congressional Record setting forth the aggregate amounts expended by the Office of General Counsel on outside counsel and other experts.

## COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

Pursuant to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee made findings and recommendations that are reflected in this report.

## PERFORMANCE GOALS AND OBJECTIVES

Pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee establishes the following performance related goals and objectives for this legislation:

The resolution will ensure the Speaker has the proper authority to take legal action, through the Office of General Counsel, on behalf of the House of Representatives, regarding the failure of the President or any other official of the executive branch to act in a manner consistent with that official's duties under the Constitution and laws of the United States with respect to implementation of the Patient Protection and Affordable Care Act and related statutes.

## ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation.

## EXCHANGE OF COMMITTEE CORRESPONDENCE

[GPO: Insert exchange of correspondence here.]

Report As Filed



# Congress of the United States
## House of Representatives
## COMMITTEE ON HOUSE ADMINISTRATION

1309 Longworth House Office Building
Washington, D.C. 20515-6157
(202) 225-8281
http://cha.house.gov



July 24, 2014

The Honorable Pete Sessions
Chairman
The Committee on Rules
H-312, The Capitol
Washington, D.C. 20515

Dear Chairman Sessions:

On July 24, 2014, the Committee on Rules ordered reported H. Res. 676, a resolution 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. As you know, the Committee on House Administration was granted an additional referral upon the bill's introduction pursuant to the Committee's jurisdiction under rule X of the Rules of the House of Representatives over the allowance and expenses of administrative officers of the House.

Because of your willingness to consult with my committee regarding this matter, I will waive consideration of the bill by the Committee on House Administration. By agreeing to waive its consideration of the bill, the Committee on House Administration does not waive its jurisdiction over H. Res. 676.

I request that you include this letter and your response as part of your committee's report on the bill and the Congressional Record during consideration of the legislation on the House floor.

Thank you for your attention to these matters.

Sincerely,

Candice S. Miller

Candice S. Miller
Chairman
Committee on House Administration

# Committee on Rules
## U.S. House of Representatives
H-312 The Capitol
Washington, DC 20515-6269



July 24, 2014

The Honorable Candice S. Miller
Chairman
Committee on House Administration
1309 Longworth House Office Building
Washington, DC 20515

Dear Chairman Miller:

Thank you for your letter regarding H. Res. 676, resolution 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, which the Committee on Rules ordered reported on July 24, 2014.

I acknowledge your committee's jurisdictional interest in this legislation and appreciate your cooperation in moving the bill to the House floor expeditiously. I agree that your decision to forego further action on the bill will not prejudice the Committee on House Administration with respect to its jurisdictional prerogatives on this or similar legislation.

I will include a copy of your letter and this response in the Committee's report on the bill and the Congressional Record when the House considers the legislation.

Sincerely,

Pete Sessions
Chairman, House Committee on Rules

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

*First Section.* This section provides independent authority for the Speaker, on behalf of the House of Representatives, to initiate or intervene in one or more civil actions alleging that the President or other senior executive branch official failed to faithfully execute the law with respect to his or her implementation of the Patient Protection and Affordable Care Act or any related provision of law. Any such suit may be filed in the appropriate Federal court and may seek any appropriate relief including declaratory relief under 28 U.S.C. § 2201-2202, equitable relief, or injunctive relief.

The use of the term "other related provision of law" is intended to capture those provisions of law which, while not part of the Affordable Care Act, were used by the executive branch in its administration or implementation, such as provisions appearing in appropriations Acts, the Internal Revenue Code, or other similar provisions of law. It is not intended to include provisions that are wholly unrelated to implementation or administration of the Affordable Care Act.

*Sec. 2.* This section requires that the Speaker notify the House of his decision to undertake a civil action pursuant to this resolution.

*Sec. 3.* Subsection (a) provides that the Office of General Counsel, acting at the direction of the Speaker, will represent the House and is authorized to employ outside counsel and other experts to assist with any legal action taken pursuant to this resolution, if needed. Subsection (b) requires that the chair of the Committee on House Administration submit reports for printing in the Congressional Record on the aggregate amounts of expenditures of the Office of General Counsel for outside counsel or other experts not more than 30 days after the end of each quarter.

CHANGES IN EXISTING HOUSE RULES MADE BY THE RESOLUTION, AS REPORTED

In compliance with clause 3(g) of rule XIII of the Rules of the House of Representatives, the Committee finds that H. Res. 676 does not propose to repeal or amend a standing rule of the House.

DISSENTING VIEWS

[GPO: Insert the text of views here.]

## DISSENTING VIEWS

The Committee on Rules has a special responsibility to consider House Resolution 676 carefully and ask whether authorizing a series of lawsuits against the President of the United States is a wise course for this body. Regrettably, the Majority has failed to take this responsibility seriously, choosing election-year politics over concern for what is best for both the institution and our cherished constitutional principles.

The proposed lawsuits are baseless, both in terms of their substantive claim and in terms of the propriety of the House filing them. They will accomplish nothing if they fail, do considerable damage to our democracy if they succeed, and in either case will waste millions of dollars of taxpayer money with virtually no transparency or accountability. This resolution authorizing the Speaker to file suit against the President is disappointing, but not surprising.

The lawsuits are a political exercise that, if history is our guide, will have little chance of surviving in the courts. They are based on two false premises. *First*, that the President acted outside of his authority with respect to the Affordable Care Act, which he did not. *Second*, that a lawsuit against the President authorized by a simple majority of one half of the Congress is the correct way to resolve this political dispute, which it certainly is not.

### I. THE PROPOSED LAWSUITS ARE ABOUT POLITICS, NOT RULE OF LAW

Despite the Majority's claims that the lawsuit is intended to defend against overreach by the Executive Branch, this resolution is about garden-variety politics. The Republicans do not like the Democratic President, and their party's electoral base considers him illegitimate despite the fact that he was elected and reelected by significant margins.

The Majority claims that this President is ignoring the law, doing things the law does not allow and declining to do things the law requires. In fact, the record shows that President Obama is using the same flexibility that presidents of both parties have long utilized to phase in new programs and policies and ensure that statutes are implemented in workable, sensible ways, minimizing disruption to individuals, families, and businesses.

If this lawsuit were successful, the result would be to implement the Affordable Care Act *faster*, which would be contrary to everything the Majority has been fighting for the past four years.

Not a single Republican voted for the Affordable Care Act, and they have spent four years trying to repeal it, delay it, derail it, defund it, and even shut down the government to stop it -- and now they are suing the President to implement it *faster*. The inconsistency is breathtaking.

## II. THE HOUSE OF REPRESENTATIVES IS NOT THE RIGHT PLAINTIFF

A threshold issue in any civil action is the requirement that the plaintiff establish "standing" to sue – a requirement derived from Article III of the Constitution. Saying that a plaintiff has standing is essentially to say they are a party in the proper position to bring the suit.[1] If the plaintiff cannot establish standing, the suit will be dismissed and the court will not address the merits of the claims. The test for standing established by the Supreme Court requires, among other things, that the plaintiff establish a concrete and particularized injury, and that it be likely the injury will be redressed by a favorable decision.[2] The House can satisfy neither of these two elements of the test.

The case law supporting our contention that the House lacks standing in this matter was outlined in detail by Walter Dellinger in his testimony before our Committee on July 16.[3] These precedents are also enumerated in the Dissenting Views of the Democratic Members of the Judiciary Committee in the committee report accompanying H.R. 4138, the ENFORCE the Law Act of 2014.[4] We urge our colleagues and anyone interested in this matter to read them both. These precedents say decisively – and with good reason – that Congress is not the right plaintiff for this sort of civil action.

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[1] Flast v. Cohen, 392 U.S. 83, 99-100 (1968).

[2] Dep't of Commerce v. House of Representatives, 525 U.S. 316 at 329 (quoting Allen, 468 U.S. at 751).

[3] *Legislative hearing on a Committee Discussion Draft of H. Res. ____, Providing for authority to initiate litigation for actions by the President inconsistent with his duties under the Constitution of the United States: Hearing Before the H. Comm. on Rules*, 113th Cong. (2014) [hereinafter "Committee Discussion Draft Hearing"] (statement of Walter E. Dellinger III).

[4] H. Rep. No. 113-377, at 33 (2014).

### A. THE INJURY REQUIREMENT OF STANDING

In a private discussion with Mr. Dellinger, he had a clear and charming way of explaining why Congress does not have standing in this sort of suit, and it is worth recounting here. He explained to us that "if Congress votes every farmer a potato, and the President declines to give one of the farmers a potato, the farmer has an injury and has grounds to sue. But we have never had a system where *Congress* gets to sue *the President* for failing to give that farmer a potato." Congress can demonstrate no concrete, particularized injury, which is essential to establish standing.

But perhaps the best authority for the inadequacy of the House's injury was *one of the Majority's own witnesses*, Florida International University College of Law professor Elizabeth Price Foley. Foley wrote in a February article entitled "Why not even Congress can sue the administration over unconstitutional executive actions" that:

> When a president delays or exempts people from a law — so-called benevolent suspensions — who has standing to sue him? Generally, no one. Benevolent suspensions of law don't, by definition, create a sufficiently concrete injury for standing. That's why, when President Obama delayed various provisions of Obamacare…his actions cannot be challenged in court…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.[5]

Professor Foley argued the opposite position before our Committee on July 16.[6] Apparently she has changed her mind.

A reminder of the fact that the House lacks the requisite injury to bring this suit came on July 21 when U.S. District Court Judge William C. Griesbach of Wisconsin dismissed a case brought by U.S. Senator Ron Johnson regarding how Members of Congress

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[5] Elizabeth Price Foley, *Why not even Congress can sue the administration over unconstitutional executive actions*, The Daily Caller, Feb. 7, 2014, http://dailycaller.com/2014/02/07/why-not-even-congress-can-sue-the-administration-over-unconstitutional-executive-actions/.

[6] Committee Discussion Draft Hearing (statement of Elizabeth Price Foley).

and their staffs would get health care.[7] Senator Johnson's allegation was that the Office of Personnel Management incorrectly applied the Affordable Care Act. Judge Griesbach dismissed the case for a lack of standing on the part of the Senator. The judge properly wrote that:

> Under our constitutional design, in the absence of a concrete injury to a party that can be redressed by the courts, disputes between the executive and legislative branches over the exercise of their respective powers are to be resolved through the political process, not by decisions issued by federal judges.[8]

He is precisely right, and more than two hundred years of Supreme Court precedent agree.

### B. THE FAULTY THEORY THAT THE HOUSE'S INJURY IS VOTE NULLIFICATION

The Republican witnesses at our hearing essentially argued that, even if Congress is not injured by the specific consequences of the way President Obama has implemented the ACA, the fact that he is phasing in certain provisions to which the statute assigned specific effective dates somehow constitutes a "nullification" of the votes of Members of Congress. That is, their votes are rendered meaningless. They believe this vote nullification is an injury in the sense that the President is intruding on the legislative power that the Constitution assigns to Congress.[9]

But it is simply not the case that the President has in any way nullified Congress' legislative power. Vote nullification, properly understood, requires that Congress is impeded in carrying out its Constitutional powers to pass legislation, appropriate money, conduct oversight and investigations, confirm nominees, declare war, impeach, etc.[10] Speaker Boehner is not alleging that the President stopped us from doing any of those things. The Speaker is proposing to sue the President because the President has not executed the

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[7] Johnson v. U.S. Office of Personnel Management, No. 14-C-009, (E.D. Wis. July 21, 2014).
[8] *Id.* at 6.
[9] Committee Discussion Draft Hearing (statement of Elizabeth Price Foley); Committee Discussion Draft Hearing (statement of Jonathan Turley).
[10] Raines v. Byrd, 521 U.S. 811, 829 (1997).

law in precisely a certain way.[11] That is an allegation that the President has not done *his* Article II job correctly, not that he has interfered with Congress doing *our* constitutional duty under Article I.

### C. Distinguishing Cases Where Congress Properly has Standing

Members of the Majority and their witnesses at our July 16 hearing repeated the argument several times that courts *have* recognized Congressional standing, such as when the subject of a Congressional subpoena has failed to comply and some entity in the Legislative Branch has sued to compel compliance.[12]

It is true that courts have recognized standing in such instances,[13] but it is simply not the same as Speaker Boehner's proposed lawsuits against the President for alleged violations of the "take care" clause. If someone fails to comply with a subpoena issued by the House, the House *does* have a concrete, particularized injury. The House is suing to vindicate its right to perform its oversight and information-gathering duties that are incidental to its own Article I legislative powers. The lawsuits authorized by H. Res. 676 are *not* based on such an injury, and are fundamentally different in that critical respect.

### D. The House is Only Half of the Congress

It is also important to note that the House of Representatives is not the Congress. *Congress* is the branch of government that has the legislative power. Even if the legislative power *had* been nullified (which it has not), the *Congress* would be the institution with the injury, and with a cause to sue. This idea that the House can go it alone and assert a legal claim that belongs to the entire Congress is fatally flawed: the Senate has not authorized such a lawsuit against the President. The dividing line in this frivolous lawsuit is not the Legislative versus the Executive. It is Republican versus Democrat.

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[11] Memorandum from Hon. John Boehner, Speaker, U.S. H.R., to House Colleagues, "[T]hat the Laws Be Faithfully Executed…", (Jun. 25, 2014) (on file with H. Comm. on Rules, Democratic Staff).

[12] Committee Discussion Draft Hearing (statement of Elizabeth Price Foley); Committee Discussion Draft Hearing (statement of Jonathan Turley).

[13] *See, e.g.,* Comm. on the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008).

### E. THE REDRESSABILITY REQUIREMENT OF STANDING

Standing also requires that it be likely the injury will be redressed by a favorable decision.[14] By the time any suit authorized by this resolution is filed, considered in DC District Court, appealed, and decided by the DC Circuit and/or the Supreme Court, the ACA delays that are the subject of the suit will likely have concluded. Barack Obama may even no longer be President at that time. The consequence of this is, whatever injury Speaker Boehner claims the House has suffered is unlikely to be redressed no matter what the various courts decide.

## III. THE COURTS ARE NOT THE RIGHT FORUM FOR THIS POLITICAL DISPUTE, BECAUSE CONGRESS HAS ITS OWN WEAPONS

Because the Constitution gives tools to each of the three coequal branches of the Federal government to assert its legitimate powers – we learn in grade school that these are called "checks and balances" – courts are understandably wary of wading into disputes between the Legislative Branch and the Executive Branch, the so-called "political branches."

This principle is sometimes referred to as the "political question doctrine," and concerns whether or not courts are the proper forum in which to settle certain kinds of disputes. For example, in one notable case, the President wanted to unilaterally terminate a treaty with a foreign government and a Senator sued arguing that such termination requires a vote of the Senate. The Supreme Court ruled that the case should be dismissed, with Justice Rehnquist explaining that the Court was being "asked to settle a dispute between coequal branches of our Government, each of which has resources available to protect and assert its interests, resources not available to private litigants outside the judicial forum."[15]

As with the issue of standing, we need not give a lengthy recitation of all the relevant precedents concerning the nonjusticiability of political questions, and we instead refer readers to Mr. Dellinger's July 16 testimony,[16] as well as the Dissenting

[14] Dep't of Commerce, 525 U.S. at 329 (quoting Allen, 468 U.S. at 751).
[15] Goldwater v. Carter, 444 U.S. 996, 1004 (1979).
[16] Committee Discussion Draft Hearing (statement of Walter E. Dellinger III).

Views in the committee report for the ENFORCE Act.[17] But essentially, among the factors that the Court has said characterize a political question is whether the Constitution says that one of the other branches is supposed to resolve the issue that a party is asking a judge to resolve.[18]

The President's responsibility and authority to execute the laws and "take Care that the Laws be faithfully executed" are committed to him explicitly by Article II.[19] Likewise, Article I of the Constitution gives to Congress powers such as those to: legislate (including to repeal statutes or disapprove of regulations, and including the incidental authority to conduct oversight and investigations); impeach; override vetoes; borrow money; regulate commerce; declare war; appropriate (and therefore condition the appropriation of) money; and, make all laws that are necessary and proper for carrying out their other powers.[20] The Senate also has the power to ratify treaties and confirm presidential appointees.[21] Each of these powers has been used at one time or another to check the power of the President

The Framers of the Constitution as well as the courts ever since have said that *these* powers, and not civil actions brought in court, are the instruments with which these two political branches are to settle disputes between them.

Justice Scalia, joined by Chief Justice Roberts and Justice Thomas, appears to express support for our contention that this lawsuit has no basis in precedent, writing that the framers of the Constitution emphatically rejected a "system in which Congress and the Executive can pop immediately into court, in their institutional capacity, whenever the President …implements a law in a manner that is not to Congress's liking."[22]

Justice Scalia's view that the Constitution gives Congress a panoply of tools to check executive power – and that lawsuits are not one of them – truly does go back all the way to the Founding Fathers. In Federalist 58, James Madison tells us:

> The House of Representatives cannot only refuse, but they alone can propose, the supplies requisite for the support of government. They, in a word, hold the purse that power-

[17] H. Rep. No. 113-377, at 33 (2014).
[18] Baker v. Carr, 369 U.S. 186, 217 (1962).
[19] U.S. CONST. art. II, §§ 1, 3.
[20] U.S. CONST. art. I, §§ 1, 8.
[21] U.S. CONST. art. II, § 2.
[22] U.S. v. Windsor, 133 S. Ct. 2675, 2704 (2013) (Scalia, J., dissenting).

> ful instrument by which we behold, in the history of the British Constitution, an infant and humble representation of the people gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government. This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.[23]

In fact, one of the most dangerous possible consequences of this lawsuit would be an unprecedented aggrandizement of the Judicial Branch. If Congress starts relying on judges, instead of the tools the Constitution *actually* gives us to check executive power, we will effect a transfer of a great deal of our authority to the judiciary. That is quite a serious matter and not a risk to be taken lightly, as the Majority appears to be doing with this highly-political lawsuit authority.

## IV. THE UNDERLYING CLAIM CONCERNING PRESIDENT OBAMA'S IMPLEMENTATION OF THE ACA IS UNFOUNDED

The testimony of Mr. Simon Lazarus of the Constitutional Accountability Center, and formerly of the Carter White House,[24] lays out clearly why President Obama's implementation of the Affordable Care Act has been consistent with the past practice of other presidents (in the areas of tax enforcement, environmental law, health care, and more), with statutory grants of authority, and with case law.[25] As Mr. Lazarus explained, courts have given wide latitude to regulatory agencies; the tax code contains a provision that has long been interpreted as giving the IRS flexibility, including flexibility to phase-in or delay under certain circumstances (such as in the case of the tax penalty underlying the employer mandate); and, whether a delay is due to scarcity of resources or justified as an exercise of prosecutorial or administrative discretion, no court has ever ruled that an agency missing a rulemaking deadline by Congress is a violation of the "take care" clause.

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[23] The Federalist No. 58 (James Madison).
[24] Committee Discussion Draft Hearing (statement of Simon Lazarus).
[25] H. Rep. No. 113-377, at 33 (2014).

In one of former Solicitor General Dellinger's analogies explaining a nuanced legal point, he compared the Administration's delays of the ACA to a situation in which:

> If North Carolina were to adopt a new requirement for automobile equipment, and it turns out that there are not enough mechanics in the county to get every car fitted, and the sheriff says to his deputies and he announces publicly, we are not going to ticket anybody for the first few months, just give people warnings. Effective date is July 1, but there are not enough mechanics. That is essentially what is going on here. And as Mr. Lazarus showed, there has been a process of the administration meeting with business that says we can't meet these deadlines, it is not practical. Is that within the scope of the authority to defer it?[26]

Mr. Lazarus also provided a detailed discussion of the meaning of the precise words in the "take care" clause, and an account of the legislative history of the clause's drafting by the Founding Fathers. His remarks on this subject are worth reading in full, as they get to the very core of the faulty premises of this lawsuit. Briefly, he explained that:

> [E]xercising presidential judgment in carrying laws into execution is precisely what the Constitution requires. It is precisely what the framers expected, when they established a separate Executive Branch under the direction of a nationally elected President, and charged him to Take Care that the Laws be Faithfully Executed.[27]

## V. THESE PARTISAN LAWSUITS ARE A WASTE OF TAXPAYER MONEY AND THE HOUSE'S PRECIOUS TIME

Given the flaws in the Majority's proposal, it is clear that this resolution and the millions of dollars it authorizes are a tremendous waste of taxpayer money. We attempted on several occasions to obtain information from the Majority about the projected cost of

[26] Committee Discussion Draft Hearing (statement of Walter E. Dellinger III).
[27] Committee Discussion Draft Hearing (statement of Simon Lazarus).

their lawsuit.[28] Their responses have provided no useful information.[29]

Likewise, Ranking Member Brady on the Committee on House Administration wrote to the Speaker,[30] asking for regular order and transparency with the use of taxpayer money. The polite reply he received from Chairwoman Candice Miller[31] also gave no information whatsoever.

In our markup, the Republicans offered a last-minute amendment which required disclosure of the cost of their lawsuit once each quarter. However, this amendment essentially restates the current disclosure rules for House expenditures.

We offered an amendment to require a weekly disclosure of the amount spent on the lawsuit. If the Majority insist on going forward with this suit, the taxpayers – who are paying the bill – and the Membership of this House – in whose name they are suing – deserve to know how many millions of dollars are being wasted on high-priced, politically-connected Washington law and lobbying firms. Rules Committee Republicans rejected our amendment on a party-line vote.

We offered an amendment that would have required the House to pay for the lawsuit by redirecting funds from another political stunt – the Benghazi Select Committee. We now know that the Republicans plan to spend a minimum of $3.3 million on the Ben-

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[28] *E.g.*, Letter from Hon. Louise Slaughter, Ranking Min. Member, H. Comm. on Rules, et. al, to Hon. Pete Sessions, Chairman, H. Comm. on Rules (July 17, 2014), available at http://democrats.rules.house.gov/sites/democrats.rules.house.gov/files/documents/113/OJ/Lawsuit/Rules_Chairman_Sessions.pdf.

[29] Letter from Hon. Pete Sessions, Chairman, H. Comm. on Rules, to Hon. Louise Slaughter, Ranking Min. Member, H. Comm. on Rules, et. al, (July 23, 2014), available at http://louise.house.gov/uploads/7%2024%2014%20PS%20to%20Rules%20Minority%20Lawsuit%20SIGNED%20(2).pdf.

[30] Letter from Hon. Robert A. Brady, Ranking Min. Member, H. Comm. on H. Admin., to Hon. John A. Boehner, Speaker, U.S. H.R. (July 14, 2014), available at http://democrats.cha.house.gov/sites/democrats.cha.house.gov/files/Brady_Boehner%20Letter_0.PDF.

[31] Letter from Hon. Candice S. Miller, Chairman, H. Comm. on H. Admin., to Hon. Robert A. Brady, Ranking Min. Member, H. Comm. on H. Admin. July 15, 2014), http://democrats.cha.house.gov/sites/democrats.cha.house.gov/files/miller%20response%20to%20speaker%20letter%2015%20july%202014.pdf.

ghazi Select Committee *just for the second half of this year*[32] (on top of the estimated $79 million it cost taxpayers to hold more than 50 votes to repeal or undermine the Affordable Care Act,[33] and the $24 billion the government shutdown cost the economy[34]). This amendment was also voted down on party lines.

One of our amendments required disclosure of which programs and budgets will be reduced to pay for the lawsuit. After all, it could very well be funded through cuts to the Veterans Affairs Committee, the Intelligence Committee, the Government Accountability Office, or the Capitol Police. Knowing which legislative functions will be curtailed in order to finance this lawsuit is an important consideration for Members deciding whether it is worth it, and how to vote. But once again our amendment was defeated.

We further moved to require disclosure of all contracts with lawyers and consultants 10 days before they are approved. Since Members of this House are supposedly the plaintiffs in this lawsuit, there is no reason for the contract with our own lawyers to be a secret to us. When Republicans used taxpayer money to pay a Washington law firm $2.3 million to defend the discriminatory Defense of Marriage Act,[35] for example, we learned later that every hour one of their attorneys worked cost the taxpayers $520.[36] That translates to a salary of just over a million dollars a year if someone works a 40-hour work week. If we are spending that kind of money, we ought to do it out in the open. Republicans on the Committee unanimously voted against this proposal, as well.

We offered an amendment prohibiting the hiring of any law firms or consultants who lobby Congress *at all*, because if they lob-

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[32] Paul Singer, *House Benghazi panel may cost $3 million this year*, USA Today, July 7, 2014, http://www.usatoday.com/story/news/politics/2014/07/07/benghazi-committee-33-million-republicans/12301935/.

[33] Calculations based on reporting of *CBS Evening News: Cost to Taxpayers* (CBS television broadcast July 11, 2013).

[34] Melanie Hicken, *Shutdown took $24 billion bite out of economy*, CNN.com (Oct. 17, 2013), http://money.cnn.com/2013/10/16/news/economy/shutdown-economic-impact/.

[35] Derek Wallbank, *Boehner's House: $2.3 Mln Defending DOMA in Losing Court Fight*, Bloomberg (June 26, 2013), http://go.bloomberg.com/political-capital/2013-06-26/boehners-house-2-3-mln-defending-doma/.

[36] Contract for Legal Services by and between Kerry W. Kircher, General Counsel, U.S. H.R., and King & Spalding (Apr. 14, 2011), http://www.politico.com/static/PPM176_110419_legal_contract.html.

by Congress for a living, Congress should not also be paying them. Then an amendment prohibiting the hiring of law firms or consultants who lobby *specifically* on Affordable Care Act implementation, *or* who have any financial stake in implementation of the ACA, because it would be a conflict of interest. Both were also rejected on a party-line vote, even though these amendments were modeled on provisions in the Republicans' own contract with their DOMA lawyers.

Since this resolution was drafted and introduced by the Majority – with no consultation or involvement by the Minority – we moved to require that the House's lawyers explain to Members of the House the likelihood of success in this lawsuit, and how they think they will overcome the legal obstacles presented by Supreme Court precedent that says these sorts of cases cannot even be considered. This was also voted down, as was an amendment to ensure that this lawsuit does not seek to prevent implementation of the Affordable Care Act's provisions relating to: (1) young adult coverage; (2) benefits for women; (3) protections for pre-existing conditions; (4) prescription discounts for seniors that close the "donut hole" in Medicare; or, (5) small business tax credits.

We offered an amendment to ensure that this lawsuit does not target people in the military, veterans, or civil servants -- any one of whom would experience significant burdens and likely rack up large legal bills defending themselves in court. Our friends in the Majority objected that causing such dislocation is not at all the intended effect of the lawsuit, but they still refused to support making it a requirement.

We also offered an amendment which required the House to consider the bipartisan comprehensive immigration reform bill, H.R. 15. The Republicans rejected it even though it would bring in millions of dollars to pay for this lawsuit and then bring in hundreds of billions more to take a big chunk out of our budget deficit.[37] This proposal was a perfect example of what this House *should* be doing with its time instead of wasting it on this lawsuit, but the Republicans disagreed.

Finally, we offered an amendment to strike the Republicans' last-minute addition to the resolution – a change made *after* our witnesses had testified about the resolution – expanding the already-broad scope of the authorized lawsuits to "any other related provision of law." We still do not understand exactly how broad

[37] Letter from Douglas W. Elmendorf, Director, Cong. Budget Office, to Hon. Nancy Pelosi, Min. Leader, U.S. H.R. (March 25, 2014), http://www.cbo.gov/sites/default/files/cbofiles/attachments/hr15.pdf.

this revised authorization is or what exactly makes a provision of law "related" to the ACA. In other words, we are no longer able to say what the resolution does and what the Speaker might choose to sue over.

## VI. DIVERGENCE FROM REGULAR ORDER

We are concerned about the divergence from regular order in the House's consideration of this resolution. An entire committee of jurisdiction, the Committee on House Administration, is failing to hold a single hearing or markup[38] despite requests from Committee Members.[39] The Majority also made significant changes to the text of the resolution *after* our Committee had held its only hearing featuring outside expert witnesses. And, we anticipate that H. Res. 676 will be considered on the floor under a completely closed rule that will deny any Member of either party the opportunity to offer amendments on the floor.

## VII. CONCLUSION

We agree with Harvard Law professor and former Assistant Attorney General under President George W. Bush, Jack Goldsmith, who writes that:

> The framers likely would have been surprised…that Congress as an institution would seek to vindicate its own institutional interests by suing the President in an Article III court. They would have expected instead that Congress would use its own political tools to fight back politically to preserve its prerogatives.[40]

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[38] Letter from Hon. Candice S. Miller, Chairman, H. Comm. on H. Admin., to Hon. Pete Sessions, Chairman, H. Comm. on Rules (July 24, 2014), http://democrats.cha.house.gov/sites/democrats.cha.house.gov/files/CHA%20letter%20to%20Rules%2024%20July%202014%20president%20%20lawsuit.pdf#overlay-context=user.

[39] Letter from Hon. Robert A. Brady, Ranking Min. Member, H. Comm. on H. Admin., to Hon. Candice S. Miller, Chairman, H. Comm. on H. Admin. (July 24, 2014), http://democrats.cha.house.gov/sites/democrats.cha.house.gov/files/final%20meeting%20request%2024%20july%202014.pdf#overlay-context=user.

[40] Jack Goldsmith, *Suing the President for Executive Overreach*, Lawfare (June 30, 2014), http://www.lawfareblog.com/2014/06/suing-the-president-for-executive-overreach/.

This resolution and the lawsuits it authorizes are what conservative writer and former Justice Department official Andrew C. McCarthy called "a classic case of assuming the pose of meaningful action while in reality doing nothing."[41] It is a partisan, one-House political gimmick. This Republican-led House, which refuses to do its own job, is instead suing the President for doing his. To yet again quote Mr. McCarthy, "sure, the leader of the opposition party controlling the House may well be able to pass an 'explicit House authorization for the lawsuit' Boehner anticipates filing. After all, how hard is it to get a bunch of congressional Republicans to agree that punting to the courts is easier than rolling up their sleeves and doing their jobs?"[42]

For all of these reasons, we must dissent.

Louise M. Slaughter
*Ranking Member*

James P. McGovern
*Member of Congress*

Alcee L. Hastings
*Member of Congress*

Jared Polis
*Member of Congress*

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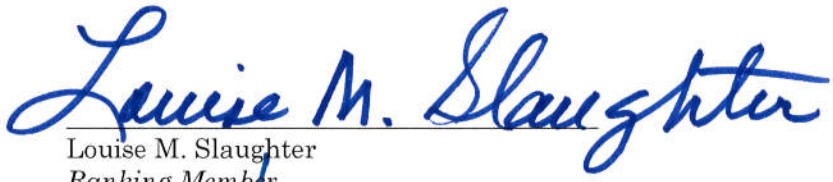
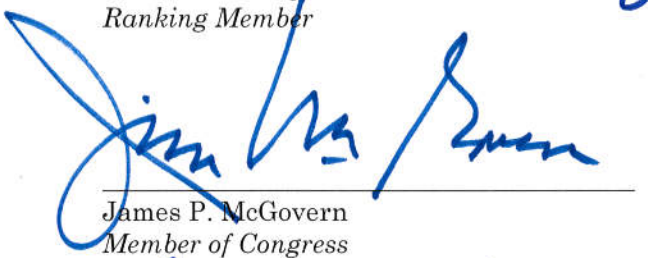
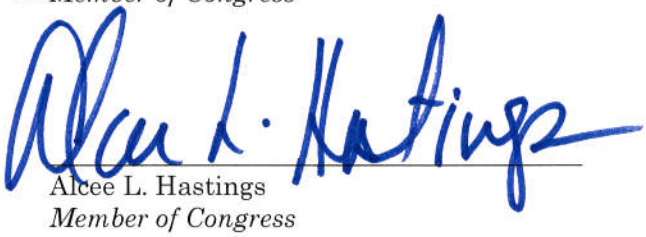
[41] Andrew C. McCarthy, *Boehner Issues Memo Explaining His Feckless Plan to Sue Obama*, National Review Online (June 25, 2014), http://www.nationalreview.com/corner/381244/boehner-issues-memo-explaining-his-feckless-plan-sue-obama-andrew-c-mccarthy.
[42] *Id*.



Louise M. Slaughter
*Ranking Member*



James P. McGovern
*Member of Congress*



Alcee L. Hastings
*Member of Congress*

Jared Polis
*Member of Congress*

House Calendar No.

113TH CONGRESS
2D SESSION

# H. RES. 676

**[Report No. 113–]**

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.

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IN THE HOUSE OF REPRESENTATIVES

JULY 22, 2014

Mr. SESSIONS submitted the following resolution; which was referred to the Committee on Rules, and in addition to the Committee on House Administration, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

JULY 24, 2014

Reported with an amendment, referred to the House Calendar and ordered to be printed

[Omit the part struck through and insert the part printed in italic]

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# RESOLUTION

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.

*Resolved,* That the Speaker is authorized to initiate or intervene in one or more civil actions on behalf of the

House of Representatives in a Federal court of competent jurisdiction to seek any appropriate relief regarding the failure of the President, the head of any department or agency, or any other officer or employee of the executive branch, to act in a manner consistent with that official's duties under the Constitution and laws of the United States with respect to implementation of any provision of the Patient Protection and Affordable Care Act, title I or subtitle B of title II of the Health Care and Education Reconciliation Act of 2010, including any amendment made by such provision, or any other related provision of law, including a failure to implement any such provision.

SEC. 2. The Speaker shall notify the House of Representatives of a decision to initiate or intervene in any civil action pursuant to this resolution.

SEC. 3. *(a) The Office*~~The Office~~ of the General Counsel of the House of Representatives, at the direction of the Speaker, shall represent the House in any civil action initiated, or in which the House intervenes, pursuant to this resolution, and may employ the services of outside counsel and other experts for this purpose.

*(b) The chair of the Committee on House Administration shall cause to be printed in the Congressional Record a statement setting forth the aggregate amounts expended by the Office of General Counsel on outside counsel and*

*other experts pursuant to subsection (a) on a quarterly basis. Such statement shall be submitted for printing not more than 30 days after the expiration of each such period.*

**House Calendar No.**

113TH CONGRESS
2D SESSION

# H. RES. 676

**[Report No. 113–]**

# RESOLUTION

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.