

March 4, 2014

TO: Virginia Sloan, President, The Constitution Project

FROM: Louis Fisher, Scholar in Residence

SUBJECT: Take Care Clause

I offer these thoughts on H.R. 3857 (Enforce the Take Care Clause Act). My comments reflect views I developed working at the Library of Congress for four decades and my continued interest in this issue in retirement while teaching at the William and Mary Law School and testifying at congressional hearings, including testimony in 2011 on committee subpoena authority for “Fast and Furious” documents.

A. H.R. 3857

This bill would authorize the House or the Senate to bring an action seeking declaratory and injunctive relief in response to “the failure of the President to meet the requirement of the Constitution to faithfully execute the law, and for other purposes.” Adoption of a resolution to authorize such action must be approved “by not fewer than 60 percent of the members present and voting.” The bill covers (1) the “promulgation of a regulation or agency administrative guidance,” (2) the “issuance of an Executive order, including an order to not defend a challenge to the constitutionality of a law and an order to not enforce a law,” and (3) the “issuance of a signing statement with respect to the enactment of a law.”

B. What Types of Legislative-Executive Disputes May be Litigated?

Each chamber of Congress has a legitimate interest in protecting legislative authority by seeking judicial relief. However, the circumstances of past litigation are much more defined and limited than the scope of litigation proposed by H.R. 3857. This section explains why some issues are appropriately taken to court and why others are not.

A major congressional standing case, *Raines v. Byrd*, 521 U.S. 811 (1997), has limited application to H.R. 3857. The Line Item Veto Act of 1996 authorized any member of Congress to bring a lawsuit challenging the constitutionality of the statute. Senator Robert C. Byrd and five other Members of Congress acted under this provision. The case was therefore unlike the procedure set forth in H.R. 3857, which calls for 60-percent of a single house to bring a lawsuit. Moreover, Senator Byrd and his colleagues were on the losing side of the vote in the House and the Senate. The Court noted that the six lawmakers “have not been authorized to represent their

respective Houses of Congress in this action, and indeed both Houses actively oppose their suit.” *Id.* at 829. In holding that the lawmakers lacked standing for failure to establish injury, the Court distinguished their case from that of *Powell v. McCormack*, 395 U.S. 486 (1969), which upheld the standing of Rep. Adam Clayton Powell in an Article III case or controversy. He had been expelled by the House.

What other legislative issues may Congress take to court?

C. Successful Legislative Lawsuits

Senator Ted Kennedy was able to establish standing and prevail in court when he challenged President Nixon’s pocket veto of December 24, 1970. Not counting December 27 (a Sunday), the Senate was absent for four days and the House for five. Kennedy gained standing because (1) the pocket veto deprived him of the constitutional right of Congress to override a veto and (2) there were no legislative or institutional remedies available to protect his interests. *Kennedy v. Sampson*, 364 F. Supp. 1075, 1078 (D.D.C. 1973), *aff’d*, 511 F.2d 430 (D.C. Cir. 1974).

Kennedy’s action differs fundamentally from the types of lawsuits anticipated by H.R. 3857. For example, President Obama on February 12, 2014, issued an executive order to increase the minimum wage for federal contractors. The order recognizes that Congress has full authority to limit and even eliminate the scope of his proposed policy. It expressly states that the order “shall be implemented consistent with applicable law and subject to the availability of appropriations.” Congress is at liberty to amend the statutory authority he cites (40 U.S.C. § 101) and to deny funding in part or in whole. Because legislative and institutional remedies are available, there is no reason to think that federal courts would agree to accept and decide this type of lawsuit brought by the House or the Senate under H.R. 3857.

Another legislative case successfully litigated in the 1970s was initiated by Rep. John Moss. Acting through his subcommittee, he issued a subpoena to obtain from the American Telephone and Telegraph Company information on “national security” wiretaps by the administration. In 1976 a district court, after balancing the investigative power of Congress against the President’s executive privilege in foreign affairs, announced in favor of presidential authority. *United States v. AT&T*, 419 F. Supp. 454 (D.D.C. 1976). An appellate court remanded, directing the lower court to seek an accommodation between the two branches. *United States v. AT&T*, 551 F.2d 384 (D.C. Cir. 1976). The appellate court decided that the House as a whole had standing to assert its investigative power and could designate a member of Congress to act on its behalf. *Id.* at 391. The case was dismissed in 1978 after the Justice Department and the subcommittee reached a settlement. *United States v. AT&T*, 567 F.2d 121 (D.C. Cir. 1977). The question addressed in this dispute—litigating the legislative power of

Congress to issue subpoenas—is far more limited and circumscribed than the broad invitation for lawsuits contemplated by H.R. 3857.

D. Current Lawsuit

The willingness of federal courts to hear and decide subpoena issues is reflected in the “Fast and Furious” lawsuit brought on behalf of the House Committee on Oversight and Government Reform. It responds to the decision of the Obama administration to withhold subpoenaed materials and its subsequent refusal to follow 2 U.S.C. § 194, which requires the U.S. Attorney to bring a contempt matter before a grand jury for possible prosecution. Instead of complying with that statutory procedure, the administration decided that Section 194 does not apply when a President exercises executive privilege.

After President Obama invoked executive privilege following a House contempt vote against Attorney General Eric Holder, it was anticipated by the House that the administration would not take the matter to grand jury and for that reason the House passed a resolution authorizing the House to initiate or intervene in judicial proceedings on behalf of House Oversight to seek declaratory judgments affirming Holder’s duty to comply with the subpoena on Fast and Furious. On August 13, 2012, the House brought a civil action against Holder by asking the district court to reject the claim of executive privilege and order the administration to release the subset of documents sought by the Committee. The complaint filed by the House states that the breadth of executive privilege advanced by the administration “would cripple congressional oversight of Executive branch agencies, to the very great detriment of the Nation and our constitutional structure.”

This litigation is tied directly to the constitutional interest of Congress to seek agency documents by subpoena to further legislative and oversight needs after an administration fails to release documents, is held in contempt, and refuses to follow the statutory procedure set forth in Section 194. Congressional litigation of this nature is infrequent and differs fundamentally from the open-ended litigation provided by H.R. 3857.

E. Precedents for “Fast and Furious” Lawsuit

Similar contempt actions followed by claims of executive privilege occurred during the Reagan administration with EPA (Anne Gorsuch) and the controversy in the Bush II administration over U.S. attorneys (Harriet Miers and Joshua Bolten). Regarding the EPA litigation, the oversight subcommittee of the House Public Works Committee sought documents on EPA’s enforcement of the “Superfund” program, involving a \$1.6 billion program established by Congress to clean up hazardous-waste sites and to prosecute companies responsible for illegal dumping. EPA Administrator Gorsuch, acting under instructions from President Reagan, refused to turn over

certain documents. The House of Representatives, voting 259 to 105, held Gorsuch in contempt. The Justice Department chose not to take the case to grand jury, as required by Section 194. Louis Fisher, *The Politics of Executive Privilege* 126-28 (2004).

The Justice Department asked a district court to declare the House action an unconstitutional intrusion into the President's authority to withhold information from Congress. The court dismissed the government's suit on the ground that judicial intervention in executive-legislative disputes "should be delayed until all possibilities for settlement have been exhausted." *United States v. U.S. House of Representatives*, 556 F. Supp. 150, 152 (D.D.C. 1983). After the court's decision, which the Justice Department chose not to appeal, the two branches were able to settle the dispute out of court. Fisher, *The Politics of Executive Privilege*, at 129.

Following the Gorsuch contempt, the Office of Legal Counsel wrote an opinion on May 30, 1984, concluding that as a matter of statutory interpretation and separation of powers analysis, a U.S. attorney is not required to bring a congressional contempt citation to a grand jury when the citation is directed against an executive official who is carrying out the President's decision to invoke executive privilege. 8 Op. O.L.C. 101 (1984).

As to the dispute during the Bush II administration, the House Judiciary Committee held in contempt White House Counsel Harriet Miers for refusing to testify and White House Chief of Staff Joshua Bolten for withholding specified documents from the committee. The House filed suit to require the administration to respond to the Committee's subpoena. In 2008, District Judge Bates found the case acceptable for judicial resolution because "at bottom this lawsuit involves a basic judicial task—subpoena enforcement—with which Federal courts are very familiar." *Committee on Jud., U.S. House of Repre. v. Miers*, 558 F. Supp. 2d 53, 56 (D.D.C. 2008). Claims of executive privilege are "routinely considered" by courts. *Id.* The executive branch in this case recommended that the case should be dismissed on three grounds (standing, cause of action, and equitable discretion), but Judge Bates found no support for those arguments. *Id.* at 65. He held that Miers was required to appear to testify before the committee and that the administration had no valid excuse for Bolten refusing to produce nonprivileged documents. The D.C. Circuit decided to leave the dispute to negotiations between the House and the incoming administration of President Barack Obama.

F. Signing Statements

Under H.R. 3857, one of the chambers, of both, could bring a civil action in response to a presidential signing statement, opening the possibility for a number of lawsuits every year to determine the meaning of often vague and conflicting statements when Presidents sign a bill. To my knowledge, only on one occasion has a federal court taken and decided a case involving a presidential signing statement, and this legal challenge came from a private citizen, not

Congress. *DaCosta v. Nixon*, 55 F.R.D. 145 (E.D.N.Y. 1972). The case involved President Nixon's statement that a section in a bill regarding the military commitment to Southeast Asia was "without binding force or effect." A district court ruled that the section became the policy of the administration when he signed the bill into law. There is little reason to expect federal courts to decide such disputes in the future, even if the House or the Senate were to pass resolutions authorizing litigation. Courts are likely to advise legislative litigants that such matters must be resolved through standard political pressures, including resort to restrictive language in authorizing and appropriating bills, sanctions against nominees who have no relationship to the dispute being litigated, and other legislative remedies.

G. Additional Considerations

As federal courts have often stated, if a Member of Congress "could obtain substantial relief from his fellow legislators through the legislative process itself, then it is an abuse of discretion for a court to entertain the legislator's action." *Melcher v. Federal Open Market Committee*, 836 F.2d 561, 565 (D.C. Cir. 1987). Courts are likely to conclude it is an abuse of discretion for the judiciary to resolve the types of executive-legislative disputes identified in H.R. 3857 even if the legislative party is the full House or the Senate.

Other issues raised by H.R. 3857 may make federal courts reluctant to take a lawsuit authorized by House or Senate resolutions. First, it might be the case that one chamber has the votes to challenge the President in court while the other chamber has the votes to support the President. Why would a court want to get in the middle of an intramural disagreement? Also, one chamber could be closely divided, with a bare 60 percent in support of an authorizing resolution. After that chamber goes to court, 39 percent of the lawmakers from that chamber might decide to file a separate brief arguing against judicial involvement. The legal reasoning of the separate brief might persuade a court to stay clear of the dispute.

H. Conclusion

Nothing in the discussion above prevents the House and the Senate from participating as intervenors to express their positions on constitutional issues, as was done in the legislative veto case of *INS v. Chadha* (1983). Individual lawmakers may be personally involved in federal litigation, as with Senator George Pepper in *Myers v. United States*, 272 U.S. 52 (1926) and Rep. Hatton Sumners in *The Pocket Veto Case*, 279 U.S. 655 (1929). Those precedents do not provide support for H.R. 3857, which seeks to initiate lawsuits for declaratory and injunctive relief regarding a broad range of presidential actions. Federal courts can be expected to reject such lawsuits by advising Congress to settle those disputes with available legislative remedies.