

FAITHFUL EXECUTION OF THE LAW ACT OF 2014

MARCH 7, 2014.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. GOODLATTE, from the Committee on the Judiciary,
submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 3973]

The Committee on the Judiciary, to whom was referred the bill (H.R. 3973) to amend section 530D of title 28, United States Code, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

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Purpose and Summary

The Faithful Execution of the Law Act amends section 530D, title 28, United States Code, in order to require the Attorney Gen-

eral of the United States to report to Congress any time a Federal official establishes or implements a formal or informal policy to refrain from enforcing any provision of Federal law. It further requires the Attorney General to report on the reason for the establishment or implementation of such a policy. These changes to section 530D will increase Executive Branch accountability and transparency and help ensure that the President takes care that the laws be faithfully executed.

Background and Need for the Legislation

Article II, Section 3, of the Constitution declares that the President “shall take Care that the Laws be faithfully executed.” This clause, known as the Take Care Clause, requires the President to enforce all constitutionally valid Acts of Congress, regardless of his own Administration’s view of their wisdom or policy. The clause imposes a duty on the President; it does not confer a discretionary power. Thus, the Take Care Clause is a limit on the Vesting Clause’s grant to the President of “the executive power.” In other words, while the Vesting Clause gives the President discretion about *how* to enforce the law, the Take Care Clause provides that he has no discretion about *whether* to do so.

However, President Obama has failed on numerous occasions to enforce Acts of Congress that he disagrees with for policy reasons and has stretched his regulatory authority to put in place policies that Congress has refused to enact. For instance, while Congress is currently debating how to reform our immigration laws, the President effectively enacted the DREAM Act himself by ordering immigration officials to stop enforcing the immigration laws against certain unlawful immigrants. When he could not get his preferred changes to the No Child Left Behind education law, he unilaterally waived its testing accountability provisions. When he objected to the work requirements in the bipartisan welfare reform law, he granted waivers that are specifically forbidden by the statutory text. Instead of working with Congress to amend Federal drug enforcement policy, he has instructed prosecutors to stop enforcing certain drug laws in certain states and mandatory minimum sentences for certain offenses.

And, most notably, the President has, without statutory authorization, waived, suspended, and amended several major provisions of his health care law. These unlawful modifications to Obamacare include: delaying for 1 year Obamacare’s employer mandate; instructing States that they are free to ignore the law’s clear language regarding which existing health care plans may be grandfathered; and promulgating an IRS rule that allows for the distribution of billions of dollars in Obamacare subsidies that Congress never authorized. The House has acted to validate retroactively some of the President’s unlawful Obamacare modifications. However, rather than embrace these legislative fixes, the President’s response has been to threaten to veto the House passed measures.

The President’s far-reaching claims of executive power, if left unchecked, will vest the President with broad domestic policy authority that the Constitution does not grant him. Although President Obama is not the first president to stretch his powers beyond their constitutional limits, executive overreach has accelerated at an

alarming rate under his Administration. Indeed, according to testimony received by the Committee, “[w]e are in the midst of a constitutional crisis with sweeping implications for our system of government. There has been a mass gravitational shift of authority to the Executive Branch that threatens the stability and functionality of our tripartite system.”¹

To help prevent executive overreach and require greater disclosure when it occurs, on January 29, 2014, Representative DeSantis introduced H.R. 3973, the “Faithful Execution of the Law Act.” This legislation promotes transparency and honesty in the Federal Government by forcing greater disclosure of Executive Branch policies of non-enforcement of Federal laws. The Justice Department is already required by law to report to Congress on non-enforcement policies based on the grounds that the law in question is unconstitutional.² H.R. 3973 extends this duty more broadly and extends the grounds for such reports beyond constitutional objections by the Executive Branch.

Currently, when the Department of Justice stops enforcing a law on the grounds that it is unconstitutional, the Attorney General is required, pursuant to 28 U.S.C. § 530D, to report to Congress. Section 530D provides in relevant part:

The Attorney General shall submit to the Congress a report of any instance in which the Attorney General or any officer of the Department of Justice establishes or implements a formal or informal policy to refrain from enforcing, applying, or administering any provision of any Federal statute, rule, regulation, program, policy, or other law whose enforcement, application, or administration is within the responsibility of the Attorney General or such officer on the grounds that such provision is unconstitutional.³

The Faithful Execution of the Law Act strengthens this provision by requiring the Attorney General to report to Congress when any Federal official establishes or implements a formal or informal policy to refrain from enforcing a Federal law and to provide the reason for the non-enforcement policy, regardless of whether it is being done on constitutional or policy grounds.

According to testimony from Professor Jonathan Turley regarding H.R. 3973, “it is hard to see the argument against such disclosures. Too often Congress has been informed of major changes by leaks to the media.”⁴ Congress should not have to rely on media leaks and other unofficial sources to find out that the Executive Branch has decided not to enforce Federal laws. Congress cannot possibly know the extent of Executive Branch non-enforcement of the laws without mandatory disclosure of all non-enforcement policies by the person who should be fully aware of such policies, namely the Attorney General, the nation’s chief law enforcement officer.

Enactment of H.R. 3973 is essential if Congress is going to play an active role in overseeing that the separation of powers between the branches is maintained and that the President is faithfully executing the laws.

¹*Enforcing the President’s Constitutional Duty to Faithfully Execute the Laws: Hearing Before the House Committee on the Judiciary*, 113th Cong. (2014) (statement of Jonathan Turley, Professor, George Washington University School of Law).

²See 28 U.S.C. § 530D(a).

³28 U.S.C. § 530D(a)(1)(i).

⁴Turley, *supra* note 1.

Hearings

The Committee on the Judiciary held 1 day of hearings on legislation to enforce the President's constitutional duty to faithfully execute the law. Testimony was received from Rep. Jim Gerlach (R-PA); Rep. Tom Rice (R-SC); Rep. Diane Black (R-TN); Rep. Ron DeSantis (R-FL); Jonathan Turley, Professor, George Washington University Law School; Christopher Schroeder, Professor, Duke University School of Law; and Elizabeth Price Foley, Professor, Florida International University College of Law.

Committee Consideration

On March 5, 2014, the Committee met in open session and ordered the bill H.R. 3973 favorably reported, without amendment, by a rollcall vote of 17 to 11, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following rollcall votes occurred during the Committee's consideration of H.R. 3973.

1. An amendment by Mr. Conyers to provide that nothing in the Act would limit or affect any action taken by the Attorney General or any officer of the Department of Justice or any other Federal officer that concerns the foreign affairs of the United States. Defeated by a rollcall vote of 11 to 18.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)		X	
Mr. Coble (NC)		X	
Mr. Smith (TX)			
Mr. Chabot (OH)		X	
Mr. Bachus (AL)		X	
Mr. Issa (CA)			
Mr. Forbes (VA)		X	
Mr. King (IA)		X	
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)		X	
Mr. Jordan (OH)		X	
Mr. Poe (TX)			
Mr. Chaffetz (UT)			
Mr. Marino (PA)		X	
Mr. Gowdy (SC)		X	
Mr. Labrador (ID)		X	
Ms. Farenthold (TX)		X	
Mr. Holding (NC)		X	
Mr. Collins (GA)		X	
Mr. DeSantis (FL)		X	
Mr. Smith (MO)		X	
[Vacant]			

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)	X		
Mr. Scott (VA)	X		
Ms. Lofgren (CA)	X		
Ms. Jackson Lee (TX)			
Mr. Cohen (TN)	X		
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)			
Ms. Chu (CA)	X		
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)	X		
Mr. Garcia (FL)	X		
Mr. Jeffries (NY)	X		
Mr. Cicilline (RI)	X		
Total	11	18	

2. Motion to report H.R. 3973 favorably, without amendment.
Passed by a rollcall vote of 17 to 11.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman	X		
Mr. Sensenbrenner, Jr. (WI)	X		
Mr. Coble (NC)	X		
Mr. Smith (TX)			
Mr. Chabot (OH)	X		
Mr. Bachus (AL)	X		
Mr. Issa (CA)			
Mr. Forbes (VA)			
Mr. King (IA)	X		
Mr. Franks (AZ)	X		
Mr. Gohmert (TX)	X		
Mr. Jordan (OH)	X		
Mr. Poe (TX)			
Mr. Chaffetz (UT)			
Mr. Marino (PA)	X		
Mr. Gowdy (SC)	X		
Mr. Labrador (ID)	X		
Ms. Farenthold (TX)	X		
Mr. Holding (NC)	X		
Mr. Collins (GA)	X		
Mr. DeSantis (FL)	X		
Mr. Smith (MO)	X		
[Vacant]			
Mr. Conyers, Jr. (MI), Ranking Member		X	

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Mr. Nadler (NY)		X	
Mr. Scott (VA)		X	
Ms. Lofgren (CA)		X	
Ms. Jackson Lee (TX)			
Mr. Cohen (TN)		X	
Mr. Johnson (GA)		X	
Mr. Pierluisi (PR)		X	
Ms. Chu (CA)		X	
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)		X	
Mr. Garcia (FL)			
Mr. Jeffries (NY)		X	
Mr. Cicilline (RI)		X	
Total	17	11	

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

The Committee advises that a Congressional Budget Office cost estimate was not available at the time this report was printed.

Duplication of Federal Programs

No provision of H.R. 3973 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

Disclosure of Directed Rule Makings

The Committee estimates that H.R. 3973 specifically directs to be completed no specific rule makings within the meaning of 5 U.S.C. § 551.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 3973, will increase Executive Branch accountability and transparency and help ensure that the President takes care that the laws be faithfully executed.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 3973 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

Section-by-Section Analysis

The following discussion describes the bill as reported by the Committee.

Section 1. Short Title.

Section 1 provides for the short title of the legislation, the “Faithful Execution of the Law Act.”

Section 2. Amendment to Section 530D of Title 28, United States Code.

Section 2 makes two changes to 28 U.S.C. § 530D. First, it expands the reporting requirements to cover non-enforcement policies of any “Federal officer.” Section 530D currently requires the Attorney General to report to Congress on non-enforcement policies adopted by the Attorney General and any other official at the Department of Justice. Second, it expands which non-enforcement policies are covered by the law. Currently, section 530D only requires reports to be made when a non-enforcement policy is adopted on the grounds that a Federal law is unconstitutional. Section 2 requires a report whenever a policy of not enforcing Federal law is established or implemented regardless of the reason.

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 28, UNITED STATES CODE

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

* * * * *

PART II—DEPARTMENT OF JUSTICE

* * * * *

CHAPTER 31—THE ATTORNEY GENERAL

* * * * *

§ 530D. Report on enforcement of laws

(a) REPORT.—

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

(A) *or any other Federal officer* establishes or implements a formal or informal policy to refrain—

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

* * * * *

Dissenting Views

INTRODUCTION

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

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

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

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

¹*Enforcing the President’s Constitutional Duty to Faithfully Execute the Laws: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. (2014) [hereinafter “Enforcing Constitutional Duty Hearing”]; *President’s Constitutional Duty to Faithfully Execute the Laws: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. (2013) [hereinafter “Faithfully Execute Hearing”].

DESCRIPTION AND BACKGROUND

DESCRIPTION

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

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

BACKGROUND

Article II, section 3 of the United States Constitution states, among other things, that the President “shall take Care that the Laws be faithfully executed.”³ In interpreting the “take care” clause, courts have employed two lines of reasoning that superficially may seem to be in tension at first blush. One line of decisions holds that the President is obligated to implement and enforce statutes as written by Congress and that the President has no authority to disregard such statutes.⁴ A second line of decisions, however, makes clear that, in implementing his charge to take care that the laws be faithfully executed, the President and the executive branch that he heads have the authority, and, indeed, the duty *not* to enforce a law in some instances because he has the discretion to determine how a law is enforced or implemented in light of enforcement priorities and limited resources, among many potential factors. As the Supreme Court has stated, “an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.”⁵

² 28 U.S.C. § 530D(a)(1)(A) provides:

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

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

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

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

³ U.S. CONST. art. II, § 3.

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

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

Regarding enforcement discretion, the Supreme Court has made clear the “take care” clause requires the President to exercise discretion, noting that decisions not to enforce have “long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to ‘take Care that the Laws be faithfully executed.’”⁶ As to delays in implementing statutes, executive branch administrative agencies routinely miss rulemaking deadlines set by Congress in statutes and no court has thus far held that such decisions by themselves constitute constitutional violations. Notably, no court has ever invalidated an agency’s exercise of prosecutorial or administrative discretion on the grounds that it violated the “take care” clause.⁷

CONCERNS WITH H.R. 3973

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

An initial problem with H.R. 3973 is that it is based on the false premise that President Obama has failed in his duty to take care that he faithfully execute the laws. Over the course of two House Judiciary Committee oversight hearings on the “take care” clause, H.R. 3973’s proponents sought to portray certain actions of President Obama as examples of his failure to execute the law. They cited, for example, the President’s Deferred Action for Childhood Arrivals (DACA) program, which temporarily defers removal of certain young adults who were brought into the country as young children.⁸ In addition, they cited several decisions by the Administration to delay or clarify the implementation of certain provisions of the Patient Protection and Affordable Care Act (ACA) as examples of the President’s failure to faithfully execute the laws.⁹ Finally, they alleged that the Justice Department’s revised charging guidelines for certain non-violent, low-level drug offenders amounted to a failure to enforce the law.¹⁰ The modified charging guidelines direct prosecutors to charge certain low-level, nonviolent drug offenders with offenses that do not trigger mandatory minimum sentences.¹¹

Rather than being examples of constitutional violations, however, these examples merely illustrate the President’s exercise of enforcement discretion in light of limited available resources, which is not only within the President’s constitutional authority, but is required by the “take care” clause. For instance, the decisions to delay the employer mandates and to allow the renewal of otherwise non-ACA-compliant health insurance plans for a temporary time period

⁶*Id.* at 832.

⁷Kate M. Manuel & Todd Garvey, *Prosecutorial Discretion in Immigration Enforcement: Legal Issues*, Congressional Research Service Report for Congress, Dec. 27, 2013, at 17 [hereinafter “CRS Immigration Report”] (“no court appears to have invalidated a policy of non-enforcement founded upon prosecutorial discretion on the grounds that the policy violated the Take Care Clause, and one Federal appellate court has opined that real or perceived inadequate enforcement does not constitute a reviewable abdication of duty”) (quoting *Texas v. United States*, 106 F.3d 661, 667 5th Cir. (1997)) (internal marks omitted).

⁸*See generally* Enforcing Constitutional Duty Hearing; Faithfully Execute Hearing.

⁹*Id.*

¹⁰*See* Enforcing Constitutional Duty Hearing.

¹¹Attorney General Eric H. Holder, Jr., Annual Meeting of the American Bar Association’s House of Delegates, Aug. 12, 2013, <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html>.

were attempts to phase-in implementation of the ACA and were not an attempt to prevent implementation. Moreover, the provision of subsidies for those in Federal exchanges was consistent with the text, history, and purpose of the ACA. It would defy common sense to suggest that the President would act to undermine his signature legislative accomplishment.

In response to questions regarding the Administration's legal authority for delaying implementation, the Treasury Department explained that this delay "is an exercise of the Treasury Department's longstanding administrative authority to grant transition relief when implementing legislation like the ACA. Administrative authority is granted by section 7805(a) of the Internal Revenue Code."¹² Section 7805(a) provides that "the Secretary [of the Treasury] shall prescribe all needful rules and regulations for the enforcement of this title."¹³

As the Treasury Department further explained, "[t]his authority has been used to postpone the application of new legislation on a number of prior occasions across Administrations."¹⁴ The Department provided several past examples where it had delayed or waived a statutory requirement, including its decision during the George W. Bush Administration to delay implementation of standards return preparers must follow to avoid penalties under the Small Business Work Opportunity Act of 2007 until 2008 despite the fact that Congress made those changes effective as of May 25, 2007.¹⁵

Allowing flexibility in the implementation of a new program, even where the statute mandates a specific deadline, is neither unusual nor a constitutional violation. Such flexibility is integral to the President's duty to "take care" that he "faithfully" execute laws. The exercise of enforcement discretion is a traditional power of the executive. As Duke University Law School Professor Christopher Schroeder testified before the Committee, "Discretionary choices are unavoidable features in executing almost all laws."¹⁶ He further testified that the "priority setting decisions necessitated by budget constraints necessarily affect *how* the laws are being executed at any point in time, not *whether* they are being executed."¹⁷ He also noted that such discretionary enforcement decisions were routine and were too numerous to count.¹⁸

With respect to the Administration's implementation of DACA, and its immigration-related enforcement decisions more generally, the exercise of discretion in immigration enforcement is squarely within the President's authority. The Supreme Court has consistently held that the exercise of such discretion is a function of the President's powers under the "take care" clause and has reiterated this principle in the immigration enforcement context as recently

¹² Letter from Mark J. Mazur, Assistant Secretary for Tax Policy, U.S. Department of the Treasury to Chairman Fred Upton, *et al.*, at 2 (July 9, 2013), available at <http://democrats.energycommerce.house.gov/sites/default/files/documents/Upton-Treasury-ACA-2013-7-9.pdf> [hereinafter "Mazur Letter"].

¹³ 26 U.S.C. § 7805 (2014).

¹⁴ Mazur Letter at 2.

¹⁵ *Id.*

¹⁶ Enforcing Constitutional Duty Hearing (statement of Christopher H. Schroeder, Charles S. Murphy Professor of Law and Professor of Public Policy Studies, Duke University, at 3) [hereinafter "Schroeder statement"].

¹⁷ *Id.* at 6 (emphases in original).

¹⁸ *Id.*

as 2012 in its decision in *Arizona v. United States*.¹⁹ As both Representative Luis Gutierrez (D-IL) and Professor Schroeder pointed out during the second hearing on the “take care” clause, DACA is not a case where the President has decided simply to not enforce the law for an entire class of people.²⁰ Although the policy applies broadly, immigration authorities must still make particular decisions regarding removal of an individual on a case-by-case basis to ensure that the individual meets DACA’s qualifications.

Immigration officials may exercise enforcement discretion in individual cases or “prosecutorial discretion may be more formalized and generalized through agency regulations or procedures.”²¹ In fact, Congress expressly directed the Secretary of Homeland Security to establish “national immigration enforcement policies and priorities.”²² The Administration’s DACA policy comports both with the statutory directive to establish national enforcement priorities and with the responsibility to exercise prosecutorial discretion under the “take care” clause of the Constitution.

While some critics argue that DACA can be distinguished because the possibility for relief is extended to persons who fall within a larger category, this ignores the fact that specific decisions to defer action still are made on a case-by-case basis. It also overlooks the fact that the executive branch has exercised its enforcement discretion on a categorical basis for decades. For example, the Kennedy Administration extended voluntary departure to persons from Cuba on a categorical basis, which allowed many otherwise deportable individuals to remain in the United States for an extended period of time.²³ President George W. Bush’s Administration temporarily suspended sanctions on employment of unauthorized aliens in areas affected by Hurricane Katrina and directed agents and officers to exercise prosecutorial discretion with respect to nursing mothers.²⁴

As with DACA, the revised Justice Department charging guidelines still require particular charging decisions to be made on a case-by-case (not class-wide) basis to ensure that a particular offender meets the required criteria. Assessing the particular facts of a case to the appropriate criminal charge is a core function of prosecutorial discretion, the wide latitude that prosecutors have in determining when, whom, how, and even whether to prosecute apparent violations of the law. Far from violating the “take care” clause,

¹⁹ 132 S. Ct. 2492 (2012). The Court relied upon the “broad discretion” exercised by Federal immigration officials, including “whether it makes sense to pursue removal at all,” in striking down almost all of Arizona’s sweeping anti-immigrant law (SB 1070). *Id.* at 2499. Because Arizona’s law could result in “unnecessary harassment of some aliens (for instance, a veteran, college student, or someone assisting with a criminal investigation) whom Federal officials determine should not be removed,” the Court concluded that the law “violates the principle that the removal process is entrusted to the discretion of the Federal Government.” *Id.* at 2506.

²⁰ Enforcing Constitutional Duty Hearing.

²¹ Memorandum from Bo Cooper, General Counsel, INS, INS Exercise of Prosecutorial Discretion, July 11, 2000, at 17–18, available at <http://iwp.legalmomentum.org/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/Bo-Cooper-memo%20pros%20discretion7.11.2000.pdf/view>.

²² 6 U.S.C. § 202 (2014).

²³ CRS Immigration Report at 1.

²⁴ *Id.*; Memorandum from Julie L. Myers, Assistant Secretary, Immigration and Customs Enforcement, Prosecutorial and Custodial Discretion, Nov. 7, 2007, available at <http://www.scribd.com/doc/22092973/ICE-Guidance-Memo-Prosecutorial-Discretion-Julie-Myers-11-7-07>.

prosecutorial discretion derives from this obligation to “take care” to “faithfully” execute the law.

Regarding the seeming tension between the duty to execute the laws and decisions not to enforce the law, Professor Schroeder testified:

At first blush, it may seem paradoxical to say that an agency is executing the laws when it decides not to enforce the law, but the paradox is completely eliminated once one recognizes that executing laws encompasses many activities, not all of which can be performed at any given time. Insofar as making decisions about where and when to enforce frees up resources for other activities constitutive of law execution, non-enforcement decisions are part of the overall process of executing the laws.²⁵

In short, the examples that the proponents of H.R. 3973 cite to justify its burdensome new reporting requirement fail to support the underlying premise of the bill, which is that routine exercises of enforcement discretion amount to violations of the President’s duty to take care that the laws be faithfully executed. In the absence of any credible examples of such a failure to meet his constitutional obligations, the justification for the bill fails.

II. H.R. 3973 RAISES SERIOUS SEPARATION-OF-POWERS CONCERNS

H.R. 3973 may pose as-applied political question problems. In a memorandum to House Judiciary Committee Democratic staff analyzing H.R. 3973, Professor Laurence Tribe of Harvard Law School noted that the practical effect of the bill would be analogous to expanding the Administrative Procedure Act²⁶ to require the Attorney General to submit a reasoned report every time any executive agency exercised its discretion not to enforce a statute.²⁷ Requiring the executive branch to explain its decision not to enforce a statute, he noted, may, in many circumstances, pose serious problems of judicial enforcement.²⁸

Professor Tribe used the hypothetical example of regime change developments in Ukraine and Egypt. Section 508 of the Foreign Assistance Act²⁹ prohibits the executive branch from spending funds to assist a country whose leader was deposed in a coup. The State Department has yet to announce whether these developments in Ukraine or Egypt are coups, and thus has not yet enforced the Act. Nevertheless, the practical effect of H.R. 3973 would be to require either the State Department to make such an announcement or the Attorney General to issue a section 530D report explaining why the State Department was not enforcing the Foreign Assistance Act.³⁰ Should the Attorney General or Secretary of State remain silent, a court would rightfully be loath to involve itself in enforcing the reporting requirement under H.R. 3973.³¹ Indeed, under the var-

²⁵ Enforcing Constitutional Duty Hearing (Schroeder statement at 7).

²⁶ 5 U.S.C. §§ 551–59, 701–06, 1305, 3105, 3344, 5372, 7521 (2014).

²⁷ Memorandum from Laurence H. Tribe to Democratic Staff of the House Judiciary Committee 2 (Mar. 3, 2014) (on file with H. Committee on the Judiciary, Democratic Staff) [hereinafter “Tribe memo”].

²⁸ *Id.*

²⁹ Pub. L. No. 87–195, 75 Stat. 424–2 (1961).

³⁰ Tribe memo at 3.

³¹ *Id.*

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

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

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

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

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

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

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217.

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

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

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

³⁶ 424 U.S. 1, 126 (1976).

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

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

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

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

CONCLUSION

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

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

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