

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.

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

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

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.

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.

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 Miller³¹ 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-

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](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 economy³⁴). 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-

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 markup³⁸ 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

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.*

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