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THE SOURCE FOR NEWS ON CAPITOL HILL SINCE 1955

Vol. 59, No. 100 | \$7.95

Opinion

Congress Has Ample Legislative Tools to Defend Itself

Guest Observer
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The House Judiciary Committee has held several hearings critical of President Barack Obama for acting in a manner that some members of Congress regard as a violation of his constitutional duty to see that the laws are faithfully carried out. One legislative remedy is HR 3857 (the Enforce the Take Care Clause Act). It would authorize either chamber of Congress, with a 60 percent majority, to file a lawsuit to compel the president to execute a law. The bill covers the promulgation of an agency regulation, issuance of an executive order and a presidential signing statement.

Some members of Congress have been successful in court. In the mid-1970s, Sen. Edward M. Kennedy was able to establish standing and prevail in court after President Richard Nixon had pocket-vetoed a bill with the Senate absent for four days and the House for five. Kennedy gained standing because the pocket veto deprived him of his constitutional right to override a veto and there were no legislative remedies available to safeguard his interests.

On other occasions, lawmakers were turned away in court because they could have obtained substantial relief from their fellow legislators through the regular legislative process. As the U.S. Court of Appeals for the D.C. Circuit explained in *Melcher v. Federal Open Market Committee* in 1987, in such cases it would be “an abuse of discretion for a court to entertain the legislator’s action.” Courts are likely to conclude it is an abuse of discretion for the judiciary to resolve the types of executive-legislative disputes identified in HR 3857.

Consider the current dispute over Obama’s public pledge to raise the minimum wage of federal contractors. His State of the Union message suggested he had some kind of independent authority to act if Congress failed to do so. In fact, it was widely understood that he would rely on statutory authority enacted in 1949 with regard to procurement policy.

That fact became plain on Feb. 12, when Obama issued an executive order to implement his policy. He cited this statutory authority: 40 U.S.C. 101. Congress is at liberty to amend that authority. The executive order also acknowledges that it is “subject to the availability of appropriations.” Congress could deny funding in part or in whole. Because legislative and institu-

tional remedies are available, there is no reason to think that federal courts would agree to accept this type of lawsuit brought under HR 3857.

The willingness of federal courts to hear legislative cases is reflected in the current “Fast and Furious” lawsuit brought by the House. 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 after the House held Attorney General Eric H. Holder Jr. in contempt, the administration decided that Section 194 does not apply when a president invokes executive

privilege, as Obama did in this dispute.

The House passed a resolution authorizing the House to initiate a judicial proceeding to seek declaratory judgments affirming Holder’s duty to comply with a subset of materials sought in the case. This litigation is tied directly to the constitutional interest of Congress to seek agency documents by subpoena to further legislative and oversight needs. Congressional litigation of this nature is infrequent and differs fundamentally from the open-ended litigation contemplated by HR 3857.

The pending Fast and Furious litigation is similar to a dispute during the George W. Bush 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 documents from the committee regarding the firing of U.S. attorneys. In 2008, District Judge John D. 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.” He said that claims of executive privilege are “routinely considered” by courts.

The types of executive-legislative conflicts anticipated in HR 3857 are not routinely considered by courts. They are left to standard efforts of political accommodation by the elected branches, including legislative hearings, congressional resort to restrictive language in authorizing and appropriating bills, sanctions against nominees who have no relationship to the dispute, and other legislative responses that have proved effective over the years.



Bill Clark/CQ Roll Call File Photo

Recent executive-legislative conflicts include Obama intimating during his State of the Union address that the president has executive authority to act in cases where Congress has failed to do so. Fisher writes that HR 3857 could be a tool in such disagreements because it gives either chamber the authority to compel the president to execute a law.

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