

Boehner vs. Obama Case Might Never Get to Court

By Eric Pianin
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Tensions between House Republicans and President Obama have been running high since Obama first took office in 2009, but they are about to reach a remarkable new level. House Speaker John Boehner on Wednesday confirmed that he intends to sue Obama in retaliation for the president's repeated efforts to circumvent Congress in order to implement or advance his policies, according to Reuters.

"The Constitution makes it clear that a president's job is to faithfully execute the laws," Boehner told reporters at the Capitol yesterday. "In my view, the president has not faithfully executed the laws."

Boehner says he intends to move swiftly against the president, beginning with bringing legislation to the floor in July to authorize a suit in federal court later this summer.

In short, a chamber of Congress long criticized for doing little of substance and lots in the way of political theater intends to drag a president into court for using excessive quasi-legislative action. The tactic signals just how deep a gulf has grown between House Republicans who have systematically thwarted much of Obama's legislative agenda and a president who long ago decided to go his own way and resort to executive actions to achieve his major domestic aims.

The president has signaled repeatedly that, absent congressional action, he would use his executive powers to advance his agenda. He has taken such actions, for example, to reduce air pollution, alter immigration policies, improve working conditions and pay for millions of Americans, and repeatedly delay the timetable for implementing elements of his signature Affordable Care Act.

Those actions have drawn condemnation from his Republican critics. "On matters ranging from health care and energy to foreign policy and education, President Obama has repeatedly run an end-around on the American people and their elected legislators, straining the boundaries of the solemn oath he took on Inauguration Day," Boehner said in a memo he circulated to House members yesterday.

"If the current president can selectively enforce, change or create laws as he chooses with impunity, without the involvement of the Legislative Branch, his successors will be able to do the same," the Speaker added.

Congressional leaders and presidents have frequently clashed throughout history over questions of separation of power or executive overreach in the conduct of war or the issuance of far-ranging executive orders. However, it is rare that the highest ranking member of the House would try to drag the president into court in a squabble over a bevy of disparate issues.

Anticipating an uproar from Democrats, the Speaker attempted to cloak his legal assault on the White House in the mantle of constitutional precepts — arguing that the chief executive under Article II, Section III of the Constitution “shall take care that the laws be faithfully executed” regardless of whether he agrees or disagrees with them.

It’s far from clear, though, whether Boehner individually or the House as an institution will have the legal standing to challenge Obama’s executive actions.

“It’s a novel theory that responds to novel executive abuses,” Ilya Shapiro, senior fellow in constitutional studies at the libertarian Cato Institute, said in an interview. “Standing, indeed, is the whole issue. And the theory is that individual members of Congress don’t have standing, but a House or a Congress altogether might have institutional standing to make claims about injuries that the executive makes against the legislative branch.”

Among the challenges awaiting Boehner, he will have to first pass a resolution of the House and get the approval of a body known as the Bipartisan Legal Advisory Group (BLAG), a five-member legal panel appointed by the Republican and Democratic House leaders, but that is stacked in favor of the majority. BLAG is the same body that represented Congress in defending the 1996 Defense of Marriage Act in court when the Obama administration declined to do so.

BLAG is empowered to direct the U.S. House Office of General Counsel to take part in litigation and represent the House. Before the general counsel can try to take the president to court, however, he will have to demonstrate that no other private party has standing to raise similar issues and that there is no other remedy, political or otherwise, that can be utilized — short of impeachment.

"This is not about impeachment," Boehner said yesterday. "This is about his faithfully executing the laws of our country."

Boehner yesterday declined to itemize the executive actions that led to his planned legal challenge, but Nicholas Quinn Rosenkranz, a constitutional law and federal jurisdictions expert at Georgetown University Law School, cited several examples of Obama’s constitutionally questionable “unilateral decisions” during congressional testimony last December. Among the actions he mentioned:

- Obama’s July 2, 2013 suspension of the employer mandate under the Affordable Care Act, which was done via a government blog post. “The blog post – written under the breezy Orwellian title ‘Continuing to Implement the ACA in a Careful, Thoughtful Manner’ – makes no mention of the [January 1, 2014] statutory deadline,” Rosenkranz said.
- Obama’s June 15, 2012 announcement that he would effectively implement a “DREAM Act” that Congress refused to pass — a measure that would exempt a broad category of children of illegal immigrants from potentially harsh penalties under the Immigration and Nationality Act. “Exempting as many as 1.76 million people from the immigration

laws goes far beyond any traditional conception of prosecutorial discretion,” Rosenkranz said.

The Obama administration was dismissive of Boehner’s threat. White House Press Secretary Josh Earnest noted that taxpayers would have to pay the legal costs for such an action and he insisted that many Americans would not support it. Congress is currently suffering from one of its lowest public approval ratings ever – a mere 7 percent, according to a recent Gallup poll. So regardless of how the public reacts to Boehner’s latest legal tactic, the approval rating couldn’t go much lower.

Rep. John Clyburn of South Carolina, a senior House Democratic leader, said the Speaker’s threat of taking the president to court was the latest in a long series of GOP efforts to discredit the president and thwart his legislative agenda. He said on MSNBC that “these guys have made it very clear” they intended to block Obama’s main priorities, and that “I don’t think you are going outside of the law when you use your executive authority” to get around such obstinacy.

“It’s a stunt, pure and simple, to rev up the conservative GOP base,” said Thomas Mann, a congressional scholar with the left-leaning Brookings Institution. “I don’t see any merit in the argument. The Obama team has carefully prepared their administrative/executive leadership strategy, one based not on an ideology about presidential power, as we saw in the last administration, but necessitated by vehement and unbending Republican opposition in Congress.”