



GOP lawsuit against Obama could outlast his presidency

By: Richard Wolf
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As if President Obama doesn't have enough on his plate, the former constitutional law professor might spend the last 2½ years of his term in court, battling Republicans over whether he violated the Constitution.

House Speaker John Boehner's plan to sue the president for going around Congress on issues such as health care, immigration and prisoner exchanges represents an unprecedented congressional reaction to arguably unprecedented presidential initiatives.

Boehner's legal challenge may be a long shot, particularly in lower federal courts that traditionally support the government. But if he carries his case all the way to the Supreme Court, it could outlast Obama's presidency.

As a result, *Boehner v. Obama* could come to symbolize the president's contentious relations with congressional Republicans in much the same way impeachment proceedings against President Bill Clinton did in the late 1990s.

"It's very unlikely that you could resolve anything of this sort until Obama is gone," says Norman Ornstein, a congressional and presidential scholar at the American Enterprise Institute.

Boehner has yet to outline Republicans' specific case against Obama for violating Article 2, Section 3 of the Constitution, which says the president "shall take care that the laws be faithfully executed." The House Rules Committee will convene a hearing next week before voting on legislation authorizing a lawsuit, which Republicans then would approve in the full House.

The speaker's choices are many, but his constitutional argument is untested. Most liberal legal experts scoff at his chances; most conservatives lend them credibility.

"It's very important that the Constitution is phrased the way it's phrased," says Simon Lazarus, senior counsel at the liberal Constitutional Accountability Center. It requires the president to show judgment and exercise authority through subordinates, he says, rather than execute every part of every law personally.

"It has to be challenged in my judgment," counters Curt Levey, executive director of the conservative Committee for Justice, "and this may be the best way to challenge it."

Whether Obama has violated the Constitution will come down to the specific actions Boehner challenges. Arguably, the president's overall record on executive actions isn't extraordinary. He has issued 182 executive orders in more than five years — a slower pace than any of his immediate predecessors. Ronald Reagan issued 381 in eight years; George W. Bush, 291.

But some of Obama's recent actions have addressed major policy issues such as the minimum wage, immigration and same-sex marriage. He made his case for unilateral action transparently, telling Congress in this year's State of the Union address that "wherever and whenever I can take steps without legislation to expand opportunity for more American families, that's what I'm going to do."

When presented with Boehner's plan of attack, his response was simple: "So sue me."

"Some of the Republicans in Congress are mad at me for going ahead and doing things," Obama told supporters in Denver Wednesday. "They have plans to sue me for taking executive actions that are within my authority — while they do nothing."

That's what Noel Canning, a Pepsi bottler in Yakima, Wash., did in 2012. The company's legal battle over Obama's "recess appointments" to the National Labor Relations Board ended last month when the Supreme Court declared the appointments unconstitutional because the Senate was not in recess.

Although Noel Canning had the right to sue over the NLRB's ruling on its union contract, it's not clear that House Republicans have standing to sue Obama.

When six members of Congress challenged the constitutionality of the presidential line-item veto in 1997, the Supreme Court denied standing, ruling that the loss of congressional power was an "abstract and widely dispersed" injury.

And last year, the court allowed the Bipartisan Legal Advisory Group, composed of the top five House leaders, to defend a law denying federal benefits to legally married same-sex couples after the Justice Department refused to defend it. It did not rule either way on the issue of standing.

Conservatives hope the courts will grant Congress standing to file suit even though Obama's actions, such as those affecting health care and immigration, did not injure anyone.

"Without judicial review of the president's suspension, there is literally no other way — short of impeachment — to defend separation of powers," appellate lawyer David Rivkin and Elizabeth Price Foley, a Florida International University law professor, argued in a recent article.

"I think standing is the whole ball game," says Ilya Shapiro, senior fellow in constitutional studies at the libertarian Cato Institute. "If Boehner gets past standing, that's the toughest challenge. At that point, I think he has the better case over Obama."

That case could include:

- A variety of exemptions and delays granted after the enactment in 2010 of Obama's signature health care law, such as the mandate that employers offer health insurance to their employees.
- The halting of deportations for thousands of undocumented immigrants who came to the USA as young children.
- The prisoner swap that freed five Taliban prisoners from Guantanamo Bay in exchange for Sgt. Bowe Bergdahl without prior congressional notification.

"I think it is clear that the president has overstepped his authority on a number of occasions," says Jonathan Turley, a professor at George Washington University Law School. "The president is effectively nullifying federal law."

On health care, the president could be helped or hurt by a ruling that could come as soon as Thursday from the U.S. Court of Appeals for the District of Columbia Circuit. A three-judge panel is set to decide whether the Internal Revenue Service had the right to offer tax subsidies to participants in federal health exchanges, rather than only state exchanges. A ruling against Obama could blow a hole in the health care law — and probably would be appealed to the full circuit court or the Supreme Court.

The case on immigration may be harder to make. In a landmark 2012 ruling involving Arizona's challenge to federal immigration laws, the Supreme Court granted considerable leeway to the federal government to exercise "discretion" when dealing with "immediate human concerns."

"You could make a case if you wanted to that he stretched his executive authority on immigration, and he stretched his executive authority in some areas of the (health care law)," Ornstein says. "All of those fit well within the zone of executive discretion. But they are using executive discretion in an expansive way."