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John Boehner's Foes in Health Care Suit? Scalia and Bork.

By Mike Sacks
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Speaker of the House John Boehner, R-Ohio, last week filed his long-anticipated lawsuit against the Obama Administration. But the Speaker's biggest foe in this inter-branch fight isn't the president or the Democrats.

It's Antonin Scalia and Robert Bork.

In the mid-1980s, the two titans of the conservative legal movement sat on the U.S. Court of Appeals for the D.C. Circuit, where within a year of each other, they both broke from their colleagues to declare that members of Congress had no business vindicating their Article I rights against Article II overreach in an Article III court.

Yet Boehner's suit on behalf of the House of Representatives attempts just that.

The complaint alleges that the Departments of Treasury and of Health and Human Services "usurp[ed] the House's Article I legislative powers" by delaying the Affordable Care Act's employer mandate and making payments to insurers without Congressional appropriation.

Once upon a time, this may have been enough. Starting in 1974, the D.C. Circuit began conferring legislative standing. The Supreme Court at the time refused to review these lines of cases, leaving it to then-judges Scalia and Bork to register their strong disagreements in separate opinions.

"[W]e sit here neither to supervise the internal workings of the executive and legislative branches nor to umpire disputes between those branches regarding their respective powers," then-Judge Scalia wrote in his concurring opinion in 1984's *Moore v. U.S. House of Representatives*.

Dissenting in 1985's *Barnes v. Kline*, Bork laid out a parade of horribles that would come from governmental standing: Congress suing the president, the president suing Congress, the judiciary suing the political branches, and members of each branch suing their own institutions.

The D.C. Circuit's precedent, Bork wrote, was "not a natural but a deformed thing, a doctrine that is not Jekyll but Hyde; and that is what is being built in this circuit, a constitutional monstrosity."

Although neither judge's opinions commanded a majority at the time, their views have been all but endorsed by the Supreme Court in the years since Scalia ascended to the Marble Palace and Bork was, well, borked.

And now Boehner must overcome the legacy of these opinions, now reflected in a 1997 Supreme Court decision, to prevail against the president.

That case, *Raines v. Byrd*, ruled that the members of Congress suing the Clinton Administration over the Line Item Veto Act, lacked the "personal stake" necessary to suffer the particularized injury that the Court's precedents require for standing.

Chief Justice Rehnquist, writing for the majority, gave a nod in a footnote to the "strong dissent" Scalia and Bork put up in the D.C. Circuit cases *Raines* effectively overruled. Scalia joined the 7-2 majority.

Simon Lazarus, senior counsel to the Constitutional Accountability Center, said that should be the end of the matter.

"The courts," Lazarus said, "have over and over made it clear that anyone in order to get into federal court to make a claim has to show a particularized injury to yourself as distinguished from a general alleged injury to the body politic as a whole."

But Elizabeth Price Foley, a law professor at Florida International University, believes Boehner's suit has a shot.

"The complaint contains more than sufficient allegations to show that the House as an institution has been injured," Foley said. According to Foley, *Raines*, which was a case brought by individual members of Congress, does not completely foreclose suits like Boehner's that are on behalf of—and authorized by—the institution itself.

And it's that distinction that may make a difference. Calling the Boehner suit "unprecedented," Ilya Shapiro, a senior fellow in constitutional studies at the Cato Institute, said, "there are lots of cases where individual congressmen or groups of congressmen have sued and those haven't gone very far, but here it's an actual house of Congress alleging an institutional injury, and that's very interesting."

How the House could find standing depends on how one interprets *Raines*. Foley says the case "strongly suggests that if there is a private plaintiff available to vindicate a separation of powers concern, that the Supreme Court would much prefer prudentially to wait for that private plaintiff."

Private plaintiffs have brought suit against the employer mandate. In September, the Seventh Circuit unanimously ruled that a physician and an association of physicians had no standing to sue. Another case, *Kawa Orthodontics v. Lew*, is pending in the Eleventh Circuit after the district court ruled against the plaintiffs.

"That individual employers affected by the employer mandate delay do not have standing makes it pretty clear that nobody else going to be able to do this except Congress," Foley said.

Jack Beermann, a professor of law at Boston University, disputes this interpretation.

"*Raines v. Byrd* doesn't say Congress does has standing if no person does," Beermann said. A concurring opinion by Justice David Souter said private parties are better plaintiffs, but a preference is not a precedent, Beermann said.

As for Boehner's unauthorized appropriation allegation, Beermann said the House has a far more potent tool at its disposal.

"It's a fallacy to turn every statutory misinterpretation into a constitutional violation, but when you're talking about money"—namely the appropriations power grounded in a very specific constitutional provision—"the remedy is impeachment," Beermann said. "If they can get it through the House to sue him over this, they might as well impeach him."

Yet *Raines* does leave Boehner some hope.

The decision rejected the members' alleged institutional injury—their "diminution of legislative power"—because it was "wholly abstract and widely dispersed." And the Court implied that its calculus might have been different had the plaintiffs been authorized by the House and Senate to act on those institutions' behalf.

Even so, Bork's shadow looms large over the House's current suit.

Bork's *Barnes* dissent from 30 years ago used the same rationale to reject individual members' suits like those in *Raines* as well as suits by the House leadership and the Senate. "[C]onstitutional powers of Congress and the President" Bork wrote, are "given judicial definition only when a private party, alleging a concrete injury, actual or threatened, brought those powers necessarily into question."