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Boehner v. Obama: Can the House of Representatives Force the President to Comply with the Law?

John G. Malcolm and Elizabeth H. Slattery

Abstract

House Speaker John Boehner believes he has found the key to reining in the executive branch: suing President Barack Obama. But while the merits of any lawsuit against the President for abusive unilateral actions may seem clear, the issue of congressional standing is anything but that. The House will have to demonstrate to a court's satisfaction that as an institution, it has been personally harmed by President Obama's actions, which have effectively nullified the votes of its members, leaving it little recourse to rectify this injustice without court intervention. Such a lawsuit would require the courts to police the limits of the political branches' powers, and overcoming the courts' natural reluctance to get involved in disputes with political overtones involving the other branches of government will not be easy.

Article I of the Constitution vests "All legislative powers herein granted" in Congress, while Article II, section 3 requires that the President "shall take Care that the Laws be faithfully executed." But what happens when the President fails to execute the law?

Time and again, President Barack Obama has pushed the limits of this duty, acting unilaterally to change or ignore the law. From refusing to abide by statutory deadlines, waiving requirements written into laws that he does not like, and choosing not to enforce laws against whole categories of offenders, President Obama has not been shy about circumventing Congress and essentially rewriting laws. Through unilateral actions, President Obama has effectively amended the Patient Protection and Affordable Care Act (also known as Obamacare), the 1996 welfare reform law, the 2001 No Child Left Behind Act, and the WARN Act, and he has "enacted" cer-

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The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400 | heritage.org

Key Points

- Many Members of Congress have expressed serious concerns about whether President Barack Obama is trampling on the separation of powers doctrine and usurping legislative powers. Is this a problem that the judicial branch can resolve or one that the political branches must work out on their own?
- House Speaker John Boehner believes the solution is a lawsuit against President Obama, heads of departments and agencies, and any other federal government employee for failing to act "in a manner consistent with that official's duties under the Constitution and laws of the United States with respect to implementation of (including a failure to implement) any provision of the Patient Protection and Affordable Care Act."
- Though the merits of any such lawsuit may seem clear, the House will have to demonstrate to a court's satisfaction that as an institution, it has been personally harmed by the President's actions, which have effectively nullified the votes of its members.

tain "laws," such as the DREAM Act, that Congress never passed.[1]

These examples, among others, make it clear that President Obama is failing to faithfully execute the law. Many Members of Congress have expressed serious concerns about whether President Obama is trampling on the separation of powers doctrine and usurping legislative powers, but what, if anything, can they do to remedy this situation? Is this a problem that the judicial branch can resolve, or is it one that the political branches must work out on their own?

Speaker of the House of Representatives John Boehner (R–OH) believes he has found the key to reining in the executive branch: suing President Obama.

Under Article III of the Constitution, the judicial power extends to resolving only "Cases" or "Controversies." This ensures that courts do not issue advisory opinions, but rather adjudicate actual disputes between adverse parties that are capable of resolution by a court. The case or controversy requirement also prevents the judiciary from intruding into matters reserved for the executive and legislative branches and protects the courts from becoming referees in every dispute between the political branches.

Establishing Article III Standing

To satisfy this constitutional requirement (known as "Article III standing"), a party must establish three things: (1) an injury-in-fact that (2) is fairly traceable to the defendant's conduct and (3) is capable of being redressed by a court.[2] This procedural requirement is the same for all lawsuits, including suits filed against the executive branch by private citizens, individual Members of Congress, or an entire chamber of Congress.

Demonstrating an injury-in-fact—an actual harm—is typically the biggest hurdle when Members of Congress attempt to sue the President for violating the separation of powers. For that reason, most successful challenges against abusive executive actions have been filed by private parties that were demonstrably harmed by those actions.

For example, in *Youngstown Sheet & Tube Co. v. Sawyer*, a steel company challenged President Harry Truman's attempt to nationalize American steel mills.[3] In finding that the President had exceeded his authority, the Supreme Court of the United States recognized that the President's "power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.... [T]he Constitution is neither silent nor equivocal about who shall make laws which the President is to execute."[4]

Likewise, in *Immigration and Naturalization Service v. Chadha*, the Supreme Court struck down the one-house legislative veto in a case brought by a foreign exchange student who challenged a House resolution ordering his deportation.[5] Congress had delegated to the Attorney General the authority to suspend deportation decisions on a case-by-case basis, but Congress subsequently passed a law that allowed one chamber the ability to "veto" the Attorney General's decision simply by passing a resolution. The Court determined that Congress may not "control administration of the laws by way of a Congressional veto."[6]

The Supreme Court has been called upon twice to resolve a dispute over the line-item veto. The first challenge, *Raines v. Byrd*, was brought by six Members of Congress who voted against the Line Item Veto Act, which authorized the President to "cancel" certain spending and tax benefit provisions after he signed them into law.[7] The Court rejected this "sore

1. *See* Elizabeth Slattery & Andrew Kloster, *An Executive Unbound: The Obama Administration's Unilateral Actions*, Heritage Foundation Legal Memorandum No. 108 (Feb. 12, 2014), *available at* http://www.heritage.org/research/reports/2014/02/an-executive-unbound-the-obama-administrations-unilateral-actions.
2. In addition to the constitutional requirements for Article III standing, courts consider a few prudential factors when evaluating congressional standing, including whether there is explicit authorization for litigation, unavailability of any private plaintiff, and lack of other legislative remedies. These prudential factors further show the courts' preference for suits brought by private parties, rather than Members of Congress, challenging the separation of powers.
3. 343 U.S. 579 (1952).
4. *Id.* at 587.
5. 462 U.S. 919 (1983).
6. *Id.* at n.16.
7. 521 U.S. 811 (1997).

loser"[8] challenge, finding that the Members lacked standing because they failed to allege a particularized harm to a private right and the claim that they suffered an institutional injury (a diminution of their power as legislators) was too "abstract and widely dispersed."[9]

The following year, the Court heard another challenge to the same law—this time brought by the City of New York and a group of private parties including a farmers' cooperative and a hospital. In *Clinton v. City of New York*, the Court struck down the Line Item Veto Act, noting that the Constitution does not allow the President to "enact, to amend, or to repeal statutes."[10]

Just this past term, the Supreme Court decided another separation of powers case, *National Labor Relations Board v. Noel Canning*, which involved a dispute between President Obama and the Senate over presidential appointments.[11] President Obama made "recess" appointments to the National Labor Relations Board (NLRB) when he deemed the Senate "unavailable to conduct business" even though it had been conducting *pro forma* sessions every three days. A bottling company appeared before the NLRB on unfair labor practices charges and subsequently challenged the board's adverse decision on the basis that it lacked a quorum to act because three of its five members had been invalidly appointed. The Supreme Court agreed, stating that the Senate is in session "when it says that it is."[12]

Establishing Congressional Standing

In contrast to private parties who file suits challenging abusive unilateral acts by executive branch officials, Members of Congress have not fared as well. Courts generally recognize two types of injuries for congressional standing: (1) a private, personal injury or (2) a direct and concrete institutional injury that amounts to vote nullification.

Powell v. McCormack is an example of the former.[13] That case involved a private injury because the House of Representatives excluded a member (Adam Clayton Powell) from taking his seat based on allegations of corruption; the Supreme Court allowed Powell's case to proceed. *Coleman v. Miller* is an example of the latter.[14] In that case, a majority of state senators challenged the ratification of a state constitutional amendment that had passed only because the state lieutenant governor cast an improper tiebreaker vote. The Supreme Court found that the senators had standing to challenge the ratification given that they did not simply lose the vote: The lieutenant governor effectively and improperly invalidated their votes.

Speaker Boehner has indicated that he will seek to have the House pass a resolution authorizing the filing of a lawsuit against President Obama. Congressional standing in a case challenging unilateral executive action would most likely involve not a private injury but an alleged institutional injury, which can be difficult to prove without the express authorization of the House or Senate. When an individual member or group of members sues the executive branch without authorization, the real dispute is often not with the President but with the other members of their chamber. The Supreme Court declined to entertain such a "sore loser" suit in *Raines* in 1997 and has not directly addressed congressional standing since then.

The federal district and appellate courts in Washington, D.C., have attempted to define the contours of congressional standing following *Raines*. Generally speaking, suits authorized by either the House or the Senate—particularly those seeking to enforce subpoenas—have been more successful than suits brought by individual members or groups acting without express authorization.

In *Committee on the Judiciary, U.S. House of Representatives v. Miers*, the federal district court for

8. The Court noted that the challengers "have not alleged that they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated. In the vote on the Line Item Veto Act, their votes were given full effect. They simply lost that vote." *Id.* at 824.
9. *Id.* at 829.
10. 524 U.S. 417, 438 (1998).
11. 573 U.S. ___ (2014).
12. *Id.*, slip op. at 34.
13. 395 U.S. 486 (1969).
14. 307 U.S. 433 (1939).

Washington, D.C., ruled that a House committee had standing to seek judicial enforcement of a subpoena issued to executive branch officials to testify before the committee about the firing of nine U.S. Attorneys.[15] The court found that the executive branch's refusal to comply with the subpoena created an injury-in-fact: the "loss of information to which [the Committee] is entitled and the institutional diminution of its subpoena power," which was "precisely the injury on which the standing of *any* government body rests when it seeks judicial enforcement of a subpoena it issued."[16]

By contrast, in *Campbell v. Clinton*, 31 Congressmen filed suit challenging President Bill Clinton's involvement of U.S. forces in a NATO air strike against Yugoslavia without obtaining a declaration of war from Congress.[17] In fact, Congress had voted against declaring war and authorizing air strikes. The Congressmen argued that their case was more in line with *Coleman* (the state senators whose votes were "nullified") rather than *Raines*, but the D.C. Circuit disagreed, finding that the ratification vote on a constitutional amendment in *Coleman* was "unusual" in that there would be no recourse once the amendment was ratified. In *Campbell* (as in *Raines*), the court found that the Congressmen had other options to stop the President's actions and ruled that they lacked standing to sue.

Three Conditions for a Lawsuit

Any lawsuit brought by the House against President Obama for his unilateral actions will be an uphill battle. Speaker Boehner has expressed his belief that the House as an institution can challenge the President in court if three conditions are met:[18]

1. No one else can challenge the President's failure, and harm is being done to the general welfare and trust in faithful execution of our laws;

2. No legislative remedy exists; and

3. The House explicitly authorizes the suit on its behalf.[19]

To demonstrate how this might work, consider a potential challenge to the President's seemingly unilateral implementation of the DREAM Act, a bill that would effectively grant amnesty to many illegal aliens currently in this country and that Congress has repeatedly considered and refrained from enacting. In June 2012, acting at the President's direction, the Department of Homeland Security directed immigration officials to defer deportation proceedings against as many as 1.7 million illegal aliens who are under age 30 and came to the United States before they had reached age 16, among other qualifications. The Obama Administration claimed that its authority to set priorities and exercise prosecutorial discretion allowed it to institute this amnesty scheme without congressional approval, despite the existence of clear (and constitutional[20]) laws against illegal immigration.

The first condition for a lawsuit (unavailability of private parties; harm to general welfare and faithful execution) shows the difficulty of challenging a "benevolent" suspension of the law. It seems fairly clear that no private party could file such a lawsuit since none could demonstrate that they suffered an actual, concrete harm. After all, President Obama is abusing the law to help a particular group, not to

15. 558 F.Supp.2d 53 (D.D.C. 2008).

16. *Id.* at 71 (internal citations omitted).

17. 203 F.3d 19 (D.C. Cir. 2000).

18. Memo from John Boehner, Speaker of the House, to House Colleagues (June 25, 2014), *available at* http://content.govdelivery.com/attachments/USSOH/2014/06/25/file_attachments/302455/Speaker-Memo-to-House-Colleagues-on-Separation-of-Powers.pdf.

19. David Rivkin and Elizabeth Price Foley articulate a similar theory of congressional standing with four points: (1) explicit legislative authority; (2) no private plaintiff available; (3) no political "self-help" available; and (4) "nullification" of institutional power injury. *See Enforcing the President's Constitutional Duty to Faithfully Enforce the Laws Before the H. Comm. on the Judiciary*, 113th Cong. (Feb. 24, 2014) (statement of Elizabeth Price Foley), *available at* http://judiciary.house.gov/_cache/files/432a1954-fb9d-4029-a10a-0ea1fd1a98ea/foley-testimony.pdf.

20. The executive branch has long held the view that the President may decline to enforce laws that he believes are unconstitutional because the Constitution is the highest law that must be faithfully executed. *See* 14 U.S. Op. Off. Legal Counsel 37, 1990 WL 488469 (Feb. 16, 1990).

harm others. But the lack of faithful execution of the law is fairly straightforward: Congress has passed a law requiring that the executive branch take certain actions with respect to illegal aliens, and the executive branch is doing the exact opposite of what the law mandates. Since there are no private parties and the executive branch's actions effectively nullify the existing law, congressional standing may be appropriate.

The second condition (lack of legislative remedies) is a highly contentious one. Some scholars have argued that Congress has the tools to deal with problems such as this but lacks the political will to do so. In general, there are three legislative remedies derived from Congress's enumerated powers: Cut appropriations to the particular programs involved, cut appropriations to other programs, or impeach executive branch officials (or even the President).[21] Each is a very dramatic action, and it would seem strange for a court to force Congress to avail itself of one of these remedies to get the President to do what he is obligated to do in the first place. In addition, none of them would necessarily solve the problem. In the case of appropriations, Congress would have to undercut laws it wants enforced, to the potential detriment of people who receive benefits under those programs. Impeachment also may not solve the problem of faithless execution of the law either: It would simply put a new person in charge.

The third condition (authorization) is simple enough: The House can pass a resolution authorizing a lawsuit.

Assuming a court did reach the merits of such a suit, yet another obstacle emerges: fashioning a remedy. If a court found that the executive branch must enforce the existing immigration laws, what sort of remedy would the court fashion? The President has cited prosecutorial discretion as a justification for refusing to apply immigration laws to DREAMers; however, it is certainly a stretch to argue that such discretion would entitle prosecutors, who are executive branch officials, to suspend the application of such laws to an entire category of clear offenders whom Congress has not exempted—but to whom the President is sympathetic.

Even if a court directed the President to enforce the laws, how much enforcement would constitute faithful execution of the law? Would deporting a single DREAMer be "faithfully" executing the law? What about five or 10 or 100? Clearly, federal prosecutors are not required to enforce every federal law against every offender; otherwise, there would be no such thing as prosecutorial discretion. Under these circumstances, a court might be reluctant to step in.

A draft House resolution indicates that Speaker Boehner will target President Obama's failure to fully implement the requirements of Obamacare. This may be a wiser choice than focusing on the DREAM Act or some other laws that involve questions about the scope of prosecutorial discretion, as a judicial remedy would be easier to fashion.

Unambiguous statutory mandates[22] (such as express deadlines in Obamacare that the executive branch has "relaxed") are routinely enforced by courts. In *Norton v. Southern Utah Wilderness Alliance*, the Supreme Court held that "when an agency is compelled by law to act within a certain time period...a court can compel the agency to act," provided that an injured party has challenged the agency's inaction.[23] The Court reaffirmed this principle recently in *Utility Air Regulatory Group v. Environmental Protection Agency*, noting that "Congress makes laws and the President, acting at times through agencies like EPA, faithfully executes them."[24] The President's duty "does not include a power to revise clear statutory terms that turn out not to work in practice."[25]

The House resolution would authorize the Speaker to initiate a lawsuit against the President, heads of departments and agencies, and any other federal government employee for failing to act "in a manner consistent with that official's duties under the Constitution and laws of the United States with respect to implementation of (including a failure to imple-

21. Art. I, § 7, cl. 1 gives the House the power of the purse; art. I, § 2, cl. 5 grants the House the power of impeachment; and art. I, § 3, cl. 6 authorizes the Senate to try all impeachments.

22. When statutes are ambiguous, the executive agencies charged with administration can clarify them and are entitled to *Chevron* deference. When statutes are unambiguous, the executive's duty is to faithfully execute them.

23. 542 U.S. 55, 65 (2004).

24. 573 U.S. ___ (2014), slip op. at 23.

25. *Id.*

ment) any provision of the Patient Protection and Affordable Care Act."[26] This would enable Speaker Boehner to sue over the various waivers from Obamacare that the Administration has granted, such as waiving deadlines for the employer mandate and caps on out-of-pocket expenses, delaying implementation of and granting a "hardship" exemption from the individual mandate for certain people, waiving requirements that Congressmen and their staffs participate in the exchanges, and extending subsidies to people who purchase insurance through the federal exchanges.[27]

Conclusion

If the House chooses to file a lawsuit against President Obama, it will face what may prove to be an insurmountable hurdle in establishing standing. To be sure, President Obama has expanded executive power at the expense of the separation of powers that the Founders so carefully devised in the Constitution, but while the merits of any lawsuit against President Obama for abusive unilateral actions may seem clear, the issue of congressional standing is anything but that.

The House will have to demonstrate to a court's satisfaction that as an institution, it has been personally harmed by President Obama's actions, which have effectively nullified the votes of its members, leaving it little recourse to rectify this injustice without court intervention. Such a lawsuit would require the courts to police the limits of the political branches' powers, and overcoming the natural reluctance of courts to get involved in disputes that have political overtones involving the other branches of government will not be easy.

*—**John G. Malcolm** is Ed Gilbertson and Sherry Lindberg Gilbertson Senior Legal Fellow and Director of the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation. **Elizabeth H. Slattery** is a Legal Fellow in the Meese Center.*

26. Draft H. Res. ___, 113th Cong., 2d Sess., *available at* http://docs.house.gov/meetings/RU/RU00/20140716/102507/BILLS-113pih-HRes___.pdf.
27. A federal district court dismissed Senator Ron Johnson's (R–WI) suit challenging an agency regulation that allows Members of Congress and their staffs to participate in the exchanges. In finding that Senator Johnson lacked standing, the court noted that "there is nothing in the Constitution stipulating that all wrongs must have remedies, much less that the remedy must lie in federal court." Johnson v. U.S. Office of Personnel Management, No. 14-C-009 (E.D. Wis. 2014), slip op. at 17.