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Boehner Planning House Lawsuit Against Obama Executive Actions

By **Daniel Newhauser**

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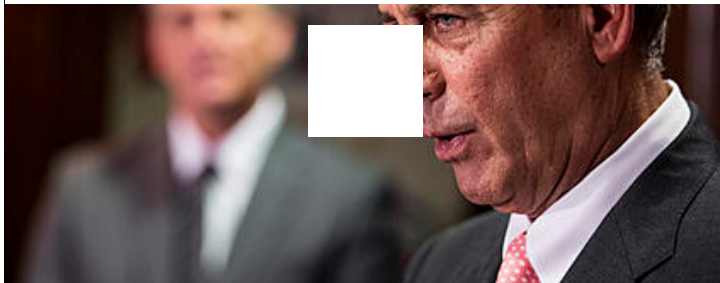
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Boehner Confirms He'll Sue Obama Over Executive Actions

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Speaker **John A. Boehner**, R-Ohio, told Republicans Tuesday he could have an announcement within days on whether the House will file a lawsuit against President Barack Obama, challenging the executive actions that have become the keystone of the administration.

The lawsuit could set up a significant test of constitutional checks and balances, with the legislative branch suing the executive branch for ignoring its mandates, and the judiciary branch deciding the outcome.

Boehner told the House Republican Conference during a closed-door meeting Tuesday morning that he has been consulting with legal scholars and plans to unveil his next steps this week or next, according to sources in the room.

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Boehner spokesman Michael Steel said further action is necessary because the Senate has not taken up bills passed by the House targeting executive actions. The House has passed a bill expediting court consideration of House resolutions starting lawsuits targeting executive overreach and another mandating that the attorney general notify Congress when the administration decides to take executive action outside of what has been authorized by

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Congress.

"The president has a clear record of ignoring the American people's elected representatives and exceeding his constitutional authority, which has dangerous implications for both our system of government and our economy," Steel said. "The House has passed legislation to address this, but it has gone nowhere in the Democratic-controlled Senate, so we are examining other options."

It remains unclear which executive action or actions the House would challenge, but Obama has given Congress ample targets. In the past several years, he has issued executive actions halting deportations of hundreds of thousands of immigrants who came to the country as children, extending the family and medical leave benefits to gay couples and raising the minimum wage for federal contractors. He has also worked around legislative deadlines for enacting provisions of the Affordable Care Act and issued other executive actions relating to the environment and the gender and race pay gap.



Speaker Boehner, R-Ohio, addresses the media following the House Republican Conference meeting Tuesday. Boehner told Republicans privately he is weighing filing a lawsuit to force President Obama to halt the administration's unilateral executive actions. (Photo By Bill Clark/CQ Roll Call)

Obama has said he takes executive action because of a divided Congress' inability to pass laws targeting important issues of the day. Republicans contend such actions are unconstitutional and thwart Congress' power.

But individual members of Congress do not have standing to sue because they are not legally recognized as injured parties. Congress as an institution, on the other hand, may sue on the grounds that there has been institutional injury done because its legislative powers have been nullified.

One path Boehner could take would be to convene the Bipartisan Legal

Advisory Group, a panel of leaders created in 1993 that votes on whether or not to sue on behalf of the House. The group consists of the speaker, the majority leader, the majority whip, the minority leader and the minority whip, and it would act on a majority vote.

Boehner last convened the group when the Obama administration dropped its defense of the Defense of Marriage Act in 2011. The House has since dropped its challenge of the law. At the time, however, Minority Leader Nancy Pelosi of California objected to the challenge, holding that it was an unwarranted way to spend taxpayer money. Her spokesman, Drew Hammill, said she will likely object similarly if Boehner moves forward with a lawsuit against the president.

"While the urgent needs of the American people are ignored by House Republicans, it is reprehensible that Speaker Boehner plans another doomed, legal boondoggle after he spent \$2.3 million in taxpayer dollars unsuccessfully defending discrimination in federal courts," Hammill said.

Boehner's legal theory is based on work by Washington, D.C., attorney David Rivkin of Baker Hostetler LLP and Elizabeth Price Foley, a professor of law at Florida International University College of Law.

Rivkin said in an interview that in addition to proving institutional injury, the House would have to prove that as an institution, it has authorized the lawsuit. A vote by the Bipartisan Legal Advisory Group would do so.

The suit would also have to prove that no other private plaintiff has standing to challenge the particular suspension of executive action and that there are no other opportunities for meaningful political remedies by Congress, for instance by repeal of the underlying law.

"Professor Foley and I feel that if those four conditions are met, the lawsuit would have an excellent chance to succeed. This is particularly the case because President Obama's numerous suspensions of the law are inflicting damage on the horizontal separations of powers and undermine individual liberty," Rivkin said.

Rivkin and Foley have argued in op-eds that most of Obama's executive orders have been benevolent — that is, they have exempted classes of citizens from the law, for instance through deferred action for childhood arrivals. Therefore, no individual has standing to sue because the actions have helped people. Congress as an institution, however, can sue because the actions

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flout the laws it has have passed.

They have argued that short of impeachment, there is no other check to the president's issuance of executive actions.

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