The Honorable John Boehner
Speaker of the House
H-232 U.S. Capitol
Washington, D.C. 20515

July 30, 2014

Dear Speaker Boehner,

We write as law professors who specialize in constitutional law and federal courts to express our view that the members of the House of Representatives lack the ability to sue the President of the United States in federal court for his alleged failure to enforce a federal statute, even if an Act of Congress were to authorize such a suit and especially without such legislative authorization. Never in American history has such a suit been allowed. In fact, in many cases, the United States Supreme Court and the United States Court of Appeals for the District of Columbia Circuit have held that members of Congress lack standing to sue in federal court. An entire House of Congress is in no stronger a position to sue. Moreover, this is exactly the type of political dispute which courts have found to pose a non-justiciable political question and that should be resolved in the political process rather than by judges.

In *Raines v. Byrd*, 521 U.S. 811 (1997), members of Congress sued to challenge the constitutionality of the line-item veto. The Court dismissed the case for lack of standing and said that the members of Congress "have alleged no injury to themselves as individuals, the institutional injury they allege is wholly abstract and widely dispersed, and their attempt to litigate this dispute at this time and in this form is contrary to historical experience. . . . We therefore hold that these individual members of Congress do not have a sufficient 'personal stake' in this dispute and have not alleged a sufficiently concrete injury to have established Article III standing."

After *Raines v. Byrd*, it is clear that legislators have standing only if they allege either that they have been singled out for specially unfavorable treatment as opposed to other members of their bodies or that their votes have been denied or nullified. This is consistent with a large body of lower court precedent, primarily from the United States Court of Appeals for the District of Columbia Circuit, that requires a showing of nullification of a vote as a prerequisite for standing. The Court of Appeals has stated that a member of Congress has standing only if "the alleged diminution in congressional influence…amount[s] to a disenfranchisement, a complete nullification or withdrawal of a voting opportunity." *Goldwater v. Carter*, 617 F.2d 697, 702 (D.C. Cir. 1979), *vacated and remanded on other grounds*, 444 U.S. 996 (1979); *see also Harrington v. Bush*, 553 F.2d 190, 213 (D.C. Cir. 1977).

It is just for this reason that the House of Representatives as a body, like its members individually, lacks standing to sue. The claim that the President has not fully enforced provisions of the Affordable Care Act, or other laws, does not amount to a "disenfranchisement, a complete nullification, or withdrawal of a voting opportunity."

Congress retains countless mechanisms to ensure enforcement of a law, ranging from use of its spending power to assigning the task to an independent agency.

On many occasions throughout American history, the Supreme Court has seen the need for the federal judiciary to stay out of disputes between the elected branches of government. That is exactly the lesson that the proposed lawsuit would ignore. Thus the suit likely would be dismissed both for want of standing and because it poses a non-justiciable political question. As Justice Scalia pointed out years ago, courts frequently fail to review actions or inaction by the Executive when a decision involves "a sensitive and inherently discretionary judgment call, ... the sort of decision that has traditionally been nonreviewable, . . . [and decisions for which] review would have disruptive practical consequences." *Webster v. Doe*, 486 U.S. 592, 608 (1988) (Scalia, J., dissenting). The question presented here poses the very essence of what the Supreme Court in *Baker v. Carr*, 369 U.S. 186, 217 (1962), said is a political question because of "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government." The idea of a judge telling a President how to exercise his discretion in enforcing a law cuts at the heart of separation of powers and thus presents a question non-justiciable in the courts.

Under long-standing practice and precedents, disputes, such as this one between members of the House of Representatives and the President, must be worked out in the political process, not the courts.

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