

ISSUES IN PERSPECTIVE

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27 December 2014

President Obama and the Separation of Powers

The United States Constitution declares quite clearly that the job of Congress is to make the laws and the job of the president is to faithfully execute those laws. It really does not grant to the president the power to suspend a law or grant waivers for its requirements. However, President Obama has done just that on many occasions, threatening the sacred doctrine of the separation of powers so central to the Constitution and to the check on despotic power. Columnist George Will writes persuasively that “Regarding immigration, health care, welfare, education, drug policy and more, Obama has suspended, waived and rewritten laws, including the Affordable Care Act” (ACA). For example, the ACA required that the employer mandate begin in 2014, but President Obama gave companies of a certain size a delay until 2016 and stipulated that other employers must certify that they will not drop employees to avoid the mandate. He did not do this via legislation coming from the Congress. He simply declared it to be so! In fact, President Obama has perpetuated more than 40 suspensions of laws. Will: “Were presidents the sole judges of the limits of their latitude, they would effectively have plenary power to vitiate the separation of powers, the Founders’ bulwark against despotism.”

In 2008, when Obama was running for president, he was a fierce critic of President Bush and his use of presidential authority. Indeed, he said that one of “America’s biggest problems” involved “George Bush trying to bring more and more power into the executive branch and not go through Congress at all.” In 2013, President Obama was giving a speech on immigration and a heckler interrupted him, declaring, “You have a power to stop deportations” to which Obama replied: “Actually I don’t, and that’s why we’re here . . . What you need to know, when I’m speaking as president of the United States and I come to this community, is that if, in fact, I could solve all these problems without passing laws in Congress, then I would do so. But we’re also a nation of laws. That’s part of our tradition. And so the easy way out is to yell and pretend like I can do something by violating our laws. And what I’m proposing is the harder path, which is to use our democratic processes to achieve the same goal that you want to achieve.” Both of these quotations from President Obama indicate a man committed to the separation of powers. But he has now embraced that which he once described as exceeding his authority. The president’s immigration changes include a plan to offer some four million people in the U.S. illegally the chance to win a reprieve from possible deportation and to gain work permits. To qualify, applicants must show they have lived in the U.S. for at least five years and have a child who is a citizen or legal permanent resident. Obama also expanded a 2012 program that gives similar safe harbor to young people brought to the U.S. illegally as children. Significantly, top leaders in 17 states have filed a lawsuit challenging Obama’s executive action on immigration. The suit filed in a federal court in Brownsville, Texas, and announced by Texas Attorney General Greg Abbott, the state’s governor-elect, asks that the president’s changes to

immigration policy be declared illegal and blocked. The courts will, therefore, decide on the constitutionality of what President Obama has done.

Additionally, one of America's most liberal constitutional scholars, Lawrence Tribe, has challenged President Obama's power when it comes to his use of the Environmental Protection Agency (EPA). [Incidentally, Obama studied law under Tribe when he was at Harvard Law School.] Tribe has joined with the world's largest coal company, Peabody Energy, to criticize the "executive overreach" of the EPA's proposed rule to regulate carbon emissions from existing power plants. In joint comments filed with the EPA, Tribe accuses the agency of "abusing statutory law, violating the Constitution's Article I, Article II, the separation of powers, the Tenth and Fifth Amendments, and in general of displaying contempt for the law." As the *Wall Street Journal* editorial board has argued, "Tribe shows that there are genuine issues about law and democratic process at stake."

Finally, as columnist Ross Douthat has illustrated, the "basic imperial reality" of President Obama's presidency is now clear. In foreign policy Obama has maintained much of the Bush-era national security architecture, but he has been more willing "to launch military operations without congressional approval; more willing to trade in assassination and deal death to American citizens; and more aggressive in his war on leakers, whistle-blowers and journalists." Further, he has been much more aggressive in his use of executive power to pursue domestic policy goals—in education, climate change, health care and now immigration—without the involvement of Congress.

How do we explain this significant shift in executive power during Obama's administration that is genuinely threatening the separation of powers doctrine? Douthat offers three explanations: (1) Public expectations. Because making laws is time-consuming and terribly political, many Americans look to the president to "do something," regardless of the constitutionality of what or how he acts. Since FDR, presidents have been expected to be "doing something" about our problems as a nation. (2) Congressional abdication. Today, the US Congress is incredibly dysfunctional and there is little consensus within the Congress to accomplish anything of significance. Therefore, it is often suggested, President Obama is right to go around Congress to get things done. Arguably, it is difficult to put bipartisan coalitions together, to correct past legislation that no longer functions well, and to work closely with a partisan Congress when it comes to foreign affairs. So, the president acts unilaterally, shunning the separation of powers. (3) His own ambitions. Obama sees himself as a transformative president, akin to Bill Clinton or Ronald Reagan. He is unwilling to pivot or even give up on some of his ambitions. He therefore seeks to accomplish his agenda his way, whether Congress goes along with him or not. He has become, in Douthat's terms, "an imperial president." Douthat concludes his perceptive essay with this observation: "And so [Obama] has chosen to betray himself in a different way, by becoming the very thing that he once campaigned against: an elected Caesar, a Cheney for liberalism, a president unbound."

The challenge we face is the long-term effects of what President Obama has done with the presidency. There is no question that, since FDR especially, the power of the president has

grown, threatening the central constitutional doctrine of the separation of powers. If he is not checked on this matter, the “imperial presidency” will only grow. As it grows personal liberty and the guarantee of limited government—both central to our Constitution—will be threatened. The menace of despotic power is real, and, over the last six years, the despotic power of the president, which was once unthinkable, is becoming more acceptable. That is not an advantageous development for our democratic-republic.

See David B. Rivkin, Jr. and Elizabeth Price Foley, “Federal Courts Need to Stop Obama from Flouting the Constitution,” in www.washingtonpost.com (25 July 2014); George Will in *Washington Post* (20 June 2014); *Wall Street Journal* editorial on Lawrence Tribe (6-7 December 2014); and Ross Douthat, *New York Times* (22 November 2014).