



**A 90 Day Study of a Constitutional Crisis –
How Executive Overreach is Impeding Your Liberties and
Undermining States' Sovereignty: A Study on the Critical Erosion
of Constitutional Checks and Balances**
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**Featuring essays by [Constituting America's](#)
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Constitutional Crisis – How Executive Overreach is Impeding Your Liberties and Undermining States’ Sovereignty: A Study on the Critical Erosion of Constitutional Checks and Balances Constitutional Scholar Essayists

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Is The Pending Deal With Iran Over Its Nuclear Program A Treaty – Or Not? – Guest Essayist: Colin Hanna

Is the pending deal with Iran over its nuclear program a treaty – or not? What powers does the Constitution give the President, and what powers does it give the Senate?

There are three places in the Constitution that address treaties with other nations. The first is the most relevant to this discussion. It is easy to recall where it is: just remember the numbers 2-2-2: It is Article II, Section 2, Clause 2. [The President] “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur...” That clearly makes a treaty conditional upon the concurrence, or affirmative vote, of two thirds of the Senators voting. Both the President and the Secretary of State are former Senators, presumably well-acquainted with that stipulation. So on what basis can they claim that Senate approval of this proposed deal is not required?

Before answering that central question, let’s examine the other two places in the Constitution mentioning treaties. The second instance is in Article III, the article that deals with the judicial powers of the Supreme Court. The portion of that Article that references treaties reads: “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority ...” This does not *define* a treaty, but it clearly establishes the Supreme Court’s power *over* treaties. This could prove critical if a case came before it claiming that a treaty was made that was not in accordance with the Constitution.

The third instance in which the Constitution mentions treaties is in Article VII, Clause 2: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land...” This has the effect of elevating valid treaties and laws to the same “supreme Law” status as the Constitution, meaning that individual States cannot abrogate validly made laws and treaties. It’s not really relevant to the Iran nuclear deal, because no State in the 21st century is likely to try to assert that a treaty does not apply to it, although at the time of adoption of the Constitution, that was a genuine concern.

Because a treaty is almost always an agreement between two *nations*, it has gradually been accepted over the years since our Constitution was adopted that a treaty is subject to *international* law. That’s where the subject at hand becomes complicated. If our Constitution is indeed the “supreme Law of the land,” then there can be no superior authority. The Federal Judicial Center (www.fjc.gov) attempts to resolve this in a document worth reading, called *Treaties as Law of the Land* ([www.fjc.gov/public/pdf.nsf/lookup/intl0627.pdf/\\$file/intl0627.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/intl0627.pdf/$file/intl0627.pdf)). A simplified reduction of its argument is that in the case of international agreements entered into by the United States, our Constitution takes *precedence* over international law, but only when a clear conflict occurs between the two. Thus our definition of a treaty is narrower than is the definition under international law. This gives rise to some confusion, especially if an American President signs a treaty that is then subjected to the Senate for ratification and fails to achieve it. Other nations citing the principles of international law may claim that the treaty became binding upon the President’s signature, as would be the case with the signature of most other

heads of state. Yet in the case of the United States, our Constitution appears to invalidate any treaty that the Senate votes down.

Beginning in the 19th century, another practice began of our making international agreements that were something less than a treaty, and thus did not require Senate ratification. The lines of demarcation between what is a treaty and what is not have become so murky that the only workable distinction is that an international agreement is considered in this country to be a treaty only if it has been ratified as a product of the advice and consent of the Senate as spelled out in our Constitution, and merely an “executive agreement” by the President when it has not. If it is an “executive agreement,” however, it is in force at the pleasure of the executive, and that executive may cancel the agreement at any time – which is especially likely when a new executive, or President, takes office. This is the point that the 47 U.S. Senators made in their letter to Iran’s Supreme Leader – and it is a valid point unique to the United States. Given that neither the former Senator negotiating the treaty as our Secretary of State nor the former Senator directing those negotiations as President appears to want to submit the Iran nuclear deal to the Senate as a treaty for ratification, which would clearly give it greater force, it is logical to conclude that they fear that it would not pass.

The latest twist in this tortured process is the possibility raised by Presidential spokesman Josh Earnest that the agreement may not even be put in writing. If that turns out to be the case, then not only will it not be a binding treaty on the United States, it won’t be worth the paper it isn’t written on.

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Why Separate Government Powers? – Guest Essayist: James D. Best

Concentrated political power frightened the Founders. They especially feared unrestrained executive power. In fact, some of the delegates to the Constitutional Convention fought for a weak executive because history had been a continuous stream of kings and rulers supplanting legislative bodies. Despite misgivings, James Madison convinced the delegates that balanced power with effective checks was the only way to secure liberty and the idea became foremost in the design of a new government.

When you study the political formation of the United States, one is struck by the recurrence of the checks and balances theme— in Madison’s convention notes, the Constitution itself, the *Federalist Papers*, the minutes of the ratification conventions, and even the Anti-Federalist papers. There can be no doubt that a national consensus supported the concept that each part of the government should act as an effective check on all of the other parts of the government.

The idea of enumerated, separated, balanced, and checked government powers did not originate with the Founders. A great philosophical movement called The Enlightenment had spread new notions about government, religion, and liberty. The United States of America had the good

fortune of becoming the testbed for the ideas of the greatest thinkers of eighteenth century Europe and America. The delegates were familiar with Montesquieu, Hume, Locke, and John Adams, who all advocated separation of power. They believed that by limiting government, liberty could survive the natural tendency of man to dictate the habits of other men.

The design purposefully slowed governmental action to allow due deliberation. This frustrates those who want the government to always “do something” about every problem, but it also hampers the government from doing something grievous that affects our life, liberty, and pursuit of happiness.

To a degree, each branch operates in slight fear that another branch will chastise or even overrule its actions. This was an intended consequence of the design. Madison wrote in Federalist No. 51, “The great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition.” In Madison’s opinion, liberty can only be protected by power restraining power. The Constitution doesn’t contain any language preserving the boundaries of the three branches. It is up to the three branches to defend their independence with their assigned powers.

Our Founding Fathers and Framers understood that governments can oppress people. During their lifetime, political power had been more than repressive ... it had been life-threatening. They understood the worst aspects of government from personal experience, but they also knew it from extensive scrutiny of governmental forms throughout history. When they met at the Pennsylvania State House in 1787, they set a goal to mitigate the worst inclinations of those in positions of power. The Founders harnessed their new government with Lilliputian ropes that would hopefully restrain it from trampling all over the little people. Except, like Gulliver, our behemoth national government has shrugged off one constraint after another until there are no practical limits to its power.

After recent elections, people wonder if the ballot box is even a potent check on the abuse of power. Ignoring recent congressional elections, this executive branch has altered the Affordable Care Act, rewritten immigration law, used No Child Left Behind to mandate Common Core, revised labor law, gutted the work requirement from Welfare Reform legislation, used a 1934 telephone law to grab regulatory control of the internet, made appointments without senate advice and consent, and done much more that is constitutionally the prerogative of Congress. In the docket is an executive order to increase corporate taxes and to bypass Congress for a nuclear agreement with Iran. There will be more, because executive orders in this administration pop-up like plates in a cafeteria line. The justification? Not the Constitution. The Constitution no longer constrains and it appears the other two branches don’t feel “it is their right, it is their duty, to throw off such Government.”

Thomas Jefferson said, “The powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others.”

President Barack Obama said, “We can’t wait for an increasingly dysfunctional Congress to do its job. Where they won’t act, I will.”

Throughout history, the more that governments exercised undue power, the more they dictated the daily activities of its citizens. That is not what our Founders wanted. They insisted on a system that derived “just powers from the consent of the governed,” not the other way around.

James D. Best, author of Tempest at Dawn, a novel about the 1787 Constitutional Convention, Principled Action, and the Steve Dancy Tales.

James Madison Would Have Said Balanced And Checked – Guest Essayist: James D. Best

The phrase checks and balances has become so commonplace that it is often spoken as if it were a single word, but in the eighteenth century, it was two distinct concepts. John Adams may have been the first to put the words *checks and balances* together in that order in his 1787 publication, *A Defense of the Constitutions of Government of the United States of America*, but balance and check is the phrase used in *The Federalist*, and that is the sequence James Madison would have thought appropriate. First, balance powers between the branches of government, and then check those powers so they are not abused.

In his voluminous Constitutional Convention notes, Madison recorded himself as saying that he “could not discover . . . any violation of the maxim which requires the great departments of power to be kept separate and distinct . . . If a constitutional discrimination of the departments on paper were a sufficient security to each against encroachments of the others, all further provisions would indeed be superfluous. But experience had taught us a distrust of that security; and that it is necessary to introduce such a balance of powers and interests, as will guarantee the provisions on paper. Instead therefore of contenting ourselves with laying down the theory in the Constitution that each department ought to be separate and distinct, it was proposed to add a defensive power to each which should maintain the theory in practice.”

First balance power, then check with defensive powers. This was the big idea of the Constitutional Convention. The delegates believed that a limited government with dispersed and checked powers was the best protection against oppression. But was the concept valid? And if valid, was the concept an anachronism of the eighteenth century no longer relevant to modern times?

This big idea is both valid and timeless. James Madison, the Father of the Constitution, didn’t invent this notion, nor did any of the other Founders for that matter. Well before the convention, the Enlightenment held balanced and checked government as a key precept, and most of the delegates were devotees to the principle prior to arriving in Philadelphia. Mr. Madison, however, became its strongest advocate. Madison spent a year in advance of the convention studying government forms throughout history and became convinced of the rightness of the idea. It wasn’t as if he didn’t already have a good understanding. He graduated and did post-graduate work at Princeton University under the tutelage of the famed Reverend Doctor John Witherspoon.

Other delegates were similarly informed about government forms. In early America, college degrees were rare, yet twenty-nine delegates held college degrees and many others were self-educated in the classics and modern political thought. Almost all of the delegates were knowledgeable about Aristotle, Locke, Hume, and Montesquieu. Together, these learned men locked themselves in a closed room for four months to debate, argue, and barter until they collectively felt their design would deny excessive power to any individual or a clique of special interests.

When critics bemoan constitutional obstacles, they're not only disparaging the Founders' work, they're impugning the wisdom of the entire Enlightenment movement. This philosophical insurgency lifted government, science, religion, and personal liberty out of the Middle Ages. It takes vain naiveté or guileful intentions to challenge a philosophy debated and peer-reviewed for over a century.

But 1787 was so long ago. The world is a much different now. We have the internet, nuclear weapons, terrorism, climate change, and digital piracy. How could something crafted over two hundred and twenty-five years ago remain relevant? The United States Constitution remains as relevant as ever because technology may change, but human nature does not. The Constitution was devised to bind people wielding power so they couldn't hurt the helpless. Our Constitution defines how we make, execute, and adjudicate laws, and it is laws—not our Constitution—that deal with issues like the internet. (A potent example considering that the FCC recently claimed total control of cyberspace using an eighty year old law originally passed to regulate copper wire communication.)

The Constitution never needed to anticipate every twist in technology or geopolitical shift in the world. That job can be handled by our three separate government branches, each assigned enumerated powers that have been balanced and checked for our protection.

James D. Best, author of Tempest at Dawn, a novel about the 1787 Constitutional Convention, Principled Action, and the Steve Dancy Tales.

This Week, 63 Years Ago-April 8, 1952: Truman Seizes Control of the Steel Industry by Executive Order-What Did the Supreme Court Decide & Why?

Part I – Guest Essayist: Professor Joerg Knipprath

Separation Of Powers Case: *Youngstown Sheet & Tube Co. v. Sawyer* (Part 1)

When the Supreme Court addresses constitutional aspects of executive “overreach,” it often does so in the context of a clash between the President relying on a broad reading of his constitutional powers and the Congress attempting to limit those powers through the use of its own. The controversy that raises the issue is usually said to involve the Court in the delicate, but vital, role of “policing the boundaries established by the Constitution.” To decide just where the boundaries relating to the separation of powers lie, the Court typically looks to the framework established in the foundational case, *Youngstown Sheet & Tube Co. v. Sawyer* (1952).

The *Steel Seizure Case*, as it is often called, arose out of President Harry Truman's decision, on April 8, 1952, to direct his Secretary of Commerce, Charles Sawyer, to seize the manufacturing plants of the major steel producers to avert a shutdown of production due to a threatened labor strike. In the face of abundant contrary evidence, the President argued that, in light of the strategic importance of steel to the Korean War effort, the strike would immediately threaten the national defense. Sawyer complied, but, conceding that the government really was not capable of running a productive enterprise, directed the officers of the companies to serve as operations managers for the government. The next day, and again two weeks later, Truman sent letters to Congress reporting his action, explaining the reason therefor, and inviting Congress to reject or restrict his action and to provide alternatives. Neither time did Congress act.

Although Truman framed the controversy mainly in terms of the strike's impact on the war and defense effort, he diluted the force of his message by also pointing to an economic justification for his action. The rapid build-up of the defense effort during the Korean War followed the huge post-World War II drawdown in defense expenditures. The defense budget for the three fiscal years before 1951 averaged \$13 billion each but quadrupled for the next three years. The resulting large increase in the demand for steel for military equipment strained the capacity of U.S. steel manufacturers. Combined with the continuing and increasing demand for steel for consumer goods and the rising incomes of consumers, the President and a Senate committee asserted that these inflationary pressures presented a grave danger to the economy.

The response to this perceived economic threat was, typical of government, to create more government. The World War II-era Wage Stabilization Board was still in business and was joined by a re-authorized Office of Price Stabilization. Those two agencies originally were in charge of controlling economic dislocations caused by World War II, as the civilian economy shifted to a war-time footing. Allegedly, the remaining civilian workers and the various affected businesses might seek to "profiteer" from scarcities in skilled labor and consumer goods, respectively, to demand higher prices for their services and products.

In this particular instance, the union's demand for their desired wage increase was approved by the Wage Stabilization Board. The steel companies were not opposed to the wage hike, as such, but wanted to get the approval of the Office of Price Stabilization to allow price increases to cover the increased labor costs. The Truman administration, through that office, was willing to allow only a partial increase, which the companies considered insufficient. Thus, the strike was on. Truman, of course, blamed the steel companies, not the government's ill-conceived attempt to politicize the workings of the economic market or its unwillingness to raise taxes needed to pay the "inflationary" price and reduce its impact.

The companies went to federal court to enjoin the government—as the new "owners" of the steel mills—from granting the union's wage demands. The judge agreed, but his order was stayed by the U.S. Court of Appeals. Both sides (the companies and the government) then sought to bypass the Court of Appeal and obtain immediate review by the U.S. Supreme Court. That court issued its ruling on June 2, less than two months after Truman's initial seizure order.

The decision was 6-3. Each member of the majority wrote an opinion. The unified dissent authored only one, by Chief Justice Fred Vinson. This chaos exposes the difficulty of finding

enduring legal principles to decide concrete cases that are intimately connected to the shifting political events giving rise to them. The problem is the structure and language of law. Law seeks to define basic rules of how the game of human interaction within a civilized society is to be played. In that vein, it seeks to provide predictability, constancy, knowability, and transparency. Its basic mechanism to seek “truth,” the courtroom trial, is epistemologically highly formal. Ultimately, it declares a clear winner and loser. Law relies on the inertia and strength of precedent and experiential tradition. Law’s language often appears stilted, because its words must have, as much as possible, precise meaning to signal to others what are their enduring rights and obligations.

Law, then, operates in precisely the opposite manner from politics. Using these guidelines, constitutional “law” works best when resolving basic issues of express individual rights, such as whether the police had probable cause to arrest, whether a statute in fact constitutes an *ex post facto* law, or whether a university regulation violates the First Amendment because it goes beyond simply forbidding incitement to violence. It is not useful as a tool to resolve essentially political questions. Political resolutions generally seek compromise and accommodation and avoid finding clear winners and losers. Political resolutions are only as permanent as the parties desire. Knowability of the precise deal made is secondary. It is often the existence of words, not their substance, that matters. At the least, words in a political accord are malleable and more likely intended from the outset to be interpreted as each party sees fit at any time. Finally, reflecting the aphorism often attributed to the Prussian chancellor Otto von Bismarck, “Those who like legislation and sausages should watch neither being made,” transparency is, if anything, to be shunned.

The nominal opinion for the Court was written by Justice Black. It is the custom of the Supreme Court that the Chief Justice assigns the writing of the formal opinion, taking into considerations various factors, including existing workload of the various justices, distribution of interesting and tedious cases, expertise in the particular topic at hand, institutional importance, and ideological coalition-building. If the Chief is on the dissenting side, the longest-serving associate justice assigns the writer. In the *Steel Seizure Case*, Chief Justice Vinson dissented, and Black, as the senior associate justice, assigned the opinion—to himself. Black delivered a rather formalistic examination of the constitutional text and the doctrine of separation of powers. Most of the concurring justices rejected that approach as too inflexible and stilted, even if they professed to concur in it.

Of the many opinions in the fractured majority, Justice Robert Jackson’s is the most enduring. He had been FDR’s Attorney General. He acknowledged that his experience influenced his views more than “conventional materials of judicial decision which seem unduly to accentuate doctrine and legal fiction,” a none-too-subtle jab at the opinion of Black, whom he disliked intensely. Jackson, like Justice Felix Frankfurter in another concurring opinion, recognized the difficulty of providing legal structure in matters that are *ad hoc*, often arise in crisis mode, and do not readily lend themselves to grand categorical resolution. “The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context,” another barb directed at Black’s opinion. In its objective of securing liberty, the Constitution diffuses power, yet also expects that the dispersed powers will be integrated into a workable government: “It

enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.”

Jackson thus identified the tension between the purpose of law, including the Constitution as a “legal charter,” to provide a fixed structure for the resolution of controversies, and the inherent fluidity of the political realm within which Congress and the President interact. Jackson’s next step (discussed in the following post) attempted to provide a durable framework to diminish that tension and to prevent either branch—but most likely the President—from gaining the upper hand to “go it alone.” The difficulty of that task for any judicial body is well-summarized in a mocking sentence from the Chief Justice’s dissent: “The diversity of views expressed in the six opinions of the majority, the lack of reference to authoritative precedent, the repeated reliance upon prior dissenting opinions, the complete disregard of the uncontroverted facts showing the gravity of the emergency and the temporary nature of the taking all serve to demonstrate how far afield one must go to affirm the order of the District Court.”

An expert on constitutional law, Prof. Joerg W. Knipprath has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums. Read more from Professor Knipprath at: <http://www.tokenconservative.com/>.

Could a President Take Over The Coal Industry? It Happened With The Steel Industry And Congress Did Nothing – Guest Essayist: Professor Joerg Knipprath

As introduced in the previous post, the 1952 *Steel Seizure Case* is a cornerstone of the Court’s separation of powers jurisprudence. The case arose out of President Harry Truman’s decision to seize the steel mills to prevent a labor strike that, he claimed, threatened steel production for the war effort in Korea. The Court was presented with the difficult problem of resolving, in a legal setting, the essentially political wrangling between Congress and the President, with the latter pressing his constitutional power claims to the maximum. At another level, the case exposed the fault lines between the American view of the Constitution as both the source and the basic formal law of government, and the classical view of constitutions as mere reflections of formal and informal political accommodations already made otherwise. To superimpose at least some structure of constitutional “law” on this political flux, Jackson envisioned what he admitted was a “somewhat over-simplified grouping of practical situations.” First, if the President acts under his claimed constitutional powers along with an express or implied authorization of Congress, his power is at its maximum, and his action likely is constitutional, unless, as when reserved powers of the states are invaded, the federal government as a whole could not act. Second, if the President acts under his claimed powers alone, without action by Congress, various practical considerations driven by events, along with past presidential action amounting to constitutional custom, may allow independent presidential action. Third, if the President acts under his claimed

powers, but Congress through its own power has expressly or implicitly limited the President, his power is at its lowest, and his action may well be unconstitutional. It is the third category that presents the clash of constitutional powers and is most likely to trigger conflict legally and politically.

There are several questions that are not clearly answered under Jackson's approach. First, if the President is acting under powers allocated to him under the Constitution, can Congress alter that allocation by mere statute? *Marbury v. Madison* appears to reject that authority.

Second, the type of executive power claimed matters. The typical case of this nature does not involve a congressional limitation of some expressly granted executive power, such as that to grant pardons. Instead, Jackson was thinking of executive action that is rooted in what a President will claim is implied from other, rather ambiguous executive powers in the Constitution, such as the "executive power [that is] vested in" the President, the "commander-in-chief" power, or the power to "take care that the laws be faithfully executed." It is the President's assertion of such a reservoir of potentially unbounded discretion that is most troubling.

Third, Jackson failed to specify the guidelines courts would have to consider to define the constitutional content of such ambiguous powers. He admitted that it was difficult to get a clear picture of the original understanding of the particulars of the President's powers. To what extent do "deeply embedded traditional ways of conducting government...give meaning to the words of [the Constitution] or supply them," as Justice Frankfurter noted? A "systematic, unbroken, executive practice, long pursued to the knowledge of Congress and never before questioned...[can become] part of the structure of our government."

Fourth, what constitutes "implicit" limitation by Congress, and how can one distinguish between that (or "implied" congressional authorization) and congressional inaction so as to differentiate between the second and third of Jackson's categories?

In the *Steel Seizure Case*, Jackson placed Truman's action in the third, and weakest, category of executive power. He explained that, in 1947, the Senate had voted against an amendment in the Taft-Hartley Act to give Presidents the authority to seize businesses to settle strikes. Moreover, the Defense Production Act of 1950, re-authorized in 1951, and the Selective Service Act gave similar powers to the President if needed for defense. Thus, Jackson (and several other justices) concluded, Congress at least implicitly had denied the President authority to seize the mills under his own constitutional powers alone. It should be noted that Truman claimed that the procedure authorized under the Defense Production Act was too cumbersome and time-consuming to be effective in the emergency he claimed existed. Jackson was not persuaded and noted drily, "emergency powers beget emergencies."

Jackson's analysis has weaknesses. It ignored the dissent's numerous accounts of seizures of businesses by solely executive action during war and otherwise, including some for the purpose of settling labor disputes. It also ignored the silence of Congress in the face of this specific action, when Truman twice called on Congress to tell him what to do. That more looks like tacit acquiescence (Jackson's first category), or at least congressional inaction (his second category).

Congressional action is a range between express prohibition of specific executive action and utter silence. What is one to make of a proposal to oppose presidential action that is passed by both houses, but is vetoed by the President? What about a proposal to do so that is passed by the House and gets a majority vote in the Senate but cannot get past a filibuster? Then there is the proposal to authorize presidential action that passes one house but not the other and is then dropped in the House-Senate conference to draft the bill. Does that show that Congress intended to *prohibit* the President from such action? Even a proposal to authorize presidential action by statute may be rejected because Congress believes that the President already has that authority through his own powers under the Constitution.

The more Presidents insist on acting unilaterally, the more likely the matter will eventually reach the Supreme Court in our system where, as Alexis de Toqueville observed, “Scarcely any political question arises...that is not resolved, sooner or later, into a judicial question.” The Court has used Justice Jackson’s approach in many cases, from upholding President Jimmy Carter’s executive agreement with Iran to take the claims of American companies against the Khomeini government out of the federal courts in favor of a joint U.S.-Iran Claims tribunal, to rejecting President George W. Bush’s order to require Texas to review the murder conviction of Ernesto Medellin because the International Court of Justice said so.

In one case, *Hamdan v. Rumsfeld* in 2006, the Court rejected the George W. Bush administration’s procedures to try captured unlawful enemy combatants, such as Osama Bin Laden’s driver, by military commission. Demonstrating the malleability of Justice Jackson’s approach, both the majority and the main dissent in *Hamdan* used that opinion for support. If the *Steel Seizure Case* framework holds, this last example especially shows that Congress must step in, as vigorously as their political circumstances permit, to show their opposition to executive overreach. It is not enough for them to remain passive because the President can veto a bill or the opposing party’s Senators might filibuster it. Even something less than a successfully passed bill that expressly limits the President may be enough to persuade a sympathetic court to vote to re-establish constitutional balance as a counter to run-away executive unilateralism.

The current administration has lost an unusually large number of unanimous votes before the Supreme Court, including on separation of powers issues, such as the President’s assertion that he could define when the Senate was “in recess.” These rebukes show that even President Obama’s appointees are skeptical about some of the bolder claims of executive power. But Congress must take the first step and act. The resigned tone with which Justice Jackson concluded his opinion summarizes the matter well, “But I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems.... We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.”

An expert on constitutional law, Prof. Joerg W. Knipprath has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums. Read

more from Professor Knipprath at: <http://www.tokenconservative.com/>.

Why The U.S. House Is Suing The Obama Administration – Guest Essayist: Hadley Heath Manning

Articles I, II, and III of the Constitution describe the roles of the legislative, executive, and judiciary branches of the federal government. It's clear that the Founders intended for Congress to make the laws, the administration to enforce the laws, and the courts to interpret the laws. Although this doctrine of Separation of Powers sounds simple, it's not. The administrative branch holds great power to promulgate regulations and make executive decisions (orders and actions) that wield the force of law, and today, many fear that this power is being abused.

The Affordable Care Act, or ObamaCare, is the ultimate recent example. The text of this comprehensive health reform law occupies between 2,000 and 3,000 pages of paper, depending on font size. The regulations promulgated pursuant to this Act would require 20,000 pages of paper. This is largely because the language of the law itself delegates many determinations to the Department of Health and Human Services. It seems Congress makes the law, but the Administration makes the *rules*.

But with regard to ObamaCare, the Administration has gone far beyond offering regulatory guidance that adds clarity or specificity to the law. On many occasions, administrative agencies have made changes to the law, some of which may not stand up to constitutional scrutiny in light of the Separation of Powers.

According to the Galen Institute, the executive branch has altered ObamaCare 30 times. A few of these actions have elicited a legal response from government watchdogs, taxpayers, and Congress. These lawsuits are examples of our system of checks and balances at work. In one of these cases, *U.S. House v. Burwell*, one of the three branches (the judiciary) ironically will have to decide whether the constitutional lines that separate the powers of the other two (Congress and the Executive) will remain relevant.

Many of the administrative changes to ObamaCare have been implementation delays, including the enforcement of the employer mandate. In short, this mandate requires employers of 50 or more workers to provide health insurance or pay a penalty. ObamaCare says clearly, in the relevant Section 1513(d), "the amendments made by this section shall apply to months beginning after December 31, 2013." But *twice* the Administration has acted unilaterally to change this enforcement date.

The delay of the employer mandate is one claim in the suit, which also points to unconstitutional "offset" payments that the federal government has been making to insurance companies without Congressional appropriation. The House voted to file this lawsuit against executive overreach under the leadership of Speaker John Boehner. The defendants are the Department of Health and Humans Services and Secretary Sylvia Burwell and Department of the Treasury and Secretary Jack Lew.

In this case, the legislative branch is alleging that it has been injured by the unconstitutional actions of the defendants, which usurp the House's constitutional authority to make legislation and to appropriate public funds.

Although it is unprecedented for the U.S. House – as a body – to file suit against the executive branch, the plaintiff describes the actions of the Obama Administration as extremely troubling and deserving of a response. From the complaint:

“The Administration has made no secret of its willingness, notwithstanding Article I of the Constitution, to act without Congress when Congress declines to enact laws that the Administration desires. Not only is there no license for the Administration to “go it alone” in our system, but such unilateral action is directly barred by Article I. Despite such fundamental constitutional limitations, the Administration repeatedly has abused its power by using executive action as a substitute for legislation.”

As the Supreme Court wrote recently in a different case, *Burrage v. United States*, “The role of this Court is to apply the statute as it is written – even if we think some other approach might ‘accord with good policy.’” Replace a few key words and the same could be said of the role of the executive branch: Its role is to *enforce* the statute *as it is written*, regardless of what administration officials believe to be the best policy. To change a policy, they should seek a legislative change from Congress (and accept Congress's authority when it chooses *not* to enact such a change).

Abraham Lincoln said, “The best way to get a bad law repealed is to enforce it strictly.” Enforcing the law is the purview of the executive branch. But in the case of ObamaCare or the Affordable Care Act, the administration is loathe to enforce the law strictly as it was written, because doing so might make the law even less popular than it has been during the last five years. That's the heart of the issue here.

Even so, it is not the prerogative of the executive branch to pick and choose among the sections and clauses of the laws, and to selectively implement laws on its own timeline. This sets a bad precedent in favor of political expediency. But those who would put more and greater power in the executive branch should be warned: What one president does by executive order, the next president might undo the same way.

This was not the way our system was meant to work: Separated powers and a system of checks and balances are meant to ensure that our government follows the rule of law, not the rule of man by fiat. This Separation of Powers may keep the three branches from superseding each other, but this design is ultimately in place for the protection of the people. A divided government is a limited one, and a limited government allows for maximum individual freedom and human flourishing.

Hadley Heath Manning is director of health policy at the Independent Women's Forum.

To Rein In Spending, Congress Must Act – Guest Essayist: Scot Faulkner

Expanding Presidential power usually erodes democracy, expands government, and facilitates the rise of an increasingly unaccountable “Imperial Presidency”. Ironically, giving Presidents more power to control spending does just the opposite.

The struggle over government spending has been a fundamental point of contention since the earliest days of our Federal Government. In the last twenty years, this issue has split the Democrats in Congress, frustrated Republican and Democratic Presidents, and generated numerous Supreme Court cases. The 1974 effort to resolve the matter, once and for all, substantively contributed to the current explosion in federal spending.

Article I of the U.S. Constitution outlines the power of Congress to create laws [Sections 1 & 8] and the prevailing nature of those laws once signed by the President or passed over a Presidential Veto [Section 7].

Article II of the U.S. Constitution vests all executive power in the President of the United States [Section 1].

This division of power and responsibility was validated by Chief Justice John Marshall in 1825, “the difference between the departments undoubtedly is that the legislature makes, the executive executes, and the judiciary construes the law.” [Wayman v. Southard, 23 U.S. 1, 44 (1825)]

Earlier, Chief Justice Marshall, in his famous Marbury v. Madison, defined the difference between political acts belonging to the executive branch alone as opposed to those executive acts governed by congressional enactments: “He acts, in this respect., under the authority of the law, and not by instructions of the President. It is a ministerial act which the law enjoins on a particular officer for a particular purpose...”

[Marbury v. Madison, 1 Cranch 137, 5 U.S. 137, 2 L.Ed. 60 (1803)]

However, what happens if Congress creates programs that eventually become unnecessary or obsolete? What happens if Congress continues to authorize and appropriate funds for those programs? What happens if Congress provides more funds than recommended by the Executive Branch or exceeds documented need?

President Thomas Jefferson was the first to test the boundaries of Executive authority to second guess Congressional spending. In the wake of the 1803 Louisiana Purchase, Jefferson reported that, “the sum of \$50,000 appropriated by Congress for providing gunboats remains unexpended. The favorable and peaceful turn of affairs on the Mississippi rendered an immediate execution of that law unnecessary.... “[1]

Following Jefferson’s precedent, subsequent Presidents selectively withheld appropriated funds on programs that were no longer needed. They also asserted they were effectuating congressional intent not circumventing it.

The Depression and World War II provided opportunities for President Franklin Roosevelt to stretch budgetary discretion beyond Jefferson's "economy" precedent. He moved funds away from what he deemed less important programs to more pressing programs. Post war demobilization gave President Harry S. Truman additional opportunities to hold back Congressional spending. Truman impounded \$735 million in additional funds appropriated by Congress to increase to 58 from 48 the President's request for Air Force groups. [2]

This expanded justification for Presidential Impoundment of Congressional funds became bipartisan when President Dwight D. Eisenhower, set aside \$137 million appropriated for the initial procurement of Nike-Zeus anti-missile system hardware. John F. Kennedy impounded \$180 million appropriated by Congress over the President's request for developing the B70 Bomber. Lyndon B. Johnson unilaterally decreased federal spending by \$5.3 billion to mitigate the inflationary impact of the Vietnam War. [3]

Congress was initially supported the President's role in managing public funds. The Anti-Deficiency Act of 1905 provided that appropriations may, "... be so apportioned by monthly or other allotments as to prevent expenditures in one portion of the year, which may necessitate deficiency or additional appropriations to complete the service of the fiscal year for which said appropriations are made." [4]

The Revised Anti-deficiency Act of 1906 stated: "Whenever it is determined...that any amount so reserved will not be required to carry out the purposes of the appropriation concerned, he {President} shall recommend the rescission of such amount ...". [5]

President Warren Harding's Budget Bureau Director, Charles E. Dawes, further asserted that an agency was not required to spend its total appropriation if it could fulfill its objectives by spending a lesser amount. [6]

Omnibus Appropriations Act of 1951, continued to expand Presidential flexibility on managing and controlling spending: "In apportioning any appropriations, reserves may be established to provide for contingencies or to affect savings whenever savings are made possible through changes in requirements, greater efficiency of operations, or other developments subsequent to the date on which such appropriation was made. [7]

A new breed of liberals began to signal a challenge to Presidential spending control. Congressman George H. Mahon (D-TX) raised concerns regarding the passage of the 1951 Act: "I would not object, as I know other members would not object, to any reasonable economies in government. But economy is one thing and the abandonment of a policy and program of Congress is another thing." [8]

Recipients of federal funds began to challenge Presidential control of spending. The Supreme Court, led by Chief Justice Earl Warren, began to constrict Presidential impoundment and other practices to control spending. [9]

These new battle lines hardened when President Richard Nixon mounted a more aggressive and

effective effort to rein-in federal spending. The Supreme Court, even under Chief Justice Warren Burger, continued to build legal precedents against Presidential intervention. [10]

“Article I, Section 1, of the Constitution vests “[a]ll legislative powers” in the Congress. No budget message of the President can alter that power and force the Congress to act to preserve legislative programs from extinction prior to the time Congress has declared

that they shall terminate, either by its action or inaction.... Thus, in absence of any contrary legislation, the defendant’s plans to terminate the CAA functions and the OEO itself are unlawful as beyond his statutory authority.”

[American Federation of Government Employees v. Phillips, 358 F. Supp. 60 (1973)]

Nixon continued to impound congressionally appropriated funds. During the 1973-1974 budget year, Nixon refused to spend \$12 billion.[11] Congressional Democrats, sensing the decline in Presidential power in the wake of the mounting Watergate scandal, passed the Congressional Budget and Impoundment Control Act of 1974 (Public law 93-344) [12]. Nixon signed the law on July 12, 1974, one of his final major acts in office. [13]

The Budget Act created the current framework within which the Federal Budget is proposed, passed, and implemented. It placed Congress firmly in the driver’s seat, and blocked future President’s from taking actions deemed constitutional and prudent for over 171 years.

The result was instant and dramatic. In the six years prior to the 1974 Act, the federal budget increased on an average of \$13.4 billion annually. In the seven years after the Act, the federal increased by over \$49 billion annually.

“From 1950-1974, federal deficits averaged 0.7% of GDP. After the Congressional Budget Act was adopted, from 1975-2007, deficits averaged 2.5% of GDP. And when the Congressional Budget Act was enacted in 1974, real (inflation-adjusted) U.S. government debt per person was \$3,240. Today, that figure is \$16,527.” [14]

Newt Gingrich resurrected the issue by proposing a new way to reassert Presidential budget management – the Line Item Veto. This was a key part of his “Contract with America” [15] It became a rallying cry for fiscal “hawks” from across the political spectrum. [16] Former President Ronald Reagan added his voice to the renewed effort: “When I was governor of California, the governor had the line item veto, and so you could veto parts of the spending in a bill. The president can’t do that. I think, frankly—of course, I’m prejudiced—government would be far better off if the president had the right of line-item veto.” [17]

The bill was introduced by Senator Bob Dole (R-KS) on January 4, 1995, cosponsored by Senator John McCain (R-AZ) and 29 other senators. Related House Bills included H.R. 147, H.R. 391, H.R. 2, H.R. 27 and H.R. 3136. The bill was signed into law by President Bill Clinton on April 9, 1996. [18]

Budget “hawks” from both parties cheered, and President Clinton began using the line item

veto. Senator Robert Byrd (D-WV), and others protective of Congressional prerogatives, filed suit to void the law. Their case was tossed out over lack of standing. [19] Another case succeeded in declaring the Line Item Veto unconstitutional. [20]

On January 31, 2006 President George W. Bush proposed the “Legislative Line Item Veto Act of 2006”. Conservatives once again rallied to giving the President expanded budgetary powers. [21] It was introduced in the House by Rep. Paul Ryan (R-WI), passed the House Budget Committee on June 14, 2006 by a vote of 24-9, and approved by the House on June 22. A similar bill in the Senate failed. [22]

Republican control of the 114th Congress, the prospect of a Republican President in 2017, and the importance of controlling federal spending, may rekindle interest in revisiting this budgetary turf fight.

Scot Faulkner served as the first Chief Administrative Officer of the U.S. House of Representatives and is currently President of Friends of Harpers Ferry National Historical Park. You may read his columns at <http://citizenoversight.blogspot.com>

FOOTNOTES

[1] “Presidential Impoundment of Funds: A Constitutional Crisis”

Gerald A. Figurski; Akron Law Review, Fall 1973, Page 107

<http://www.uakron.edu/dotAsset/a62fd478-04cc-4165-a101-3f19e314f3c1.pdf> [2]

Ibid. Page 111.

[3] Ibid.

[4] Ibid. Page 109.

[5] Ibid.

[6] Ibid.

[7] 2331 U.S.C. 665(c)(2) (1970)

[8] Op.Cit. Figurski, Page 114.

[9] http://www.law.harvard.edu/faculty/hjackson/BudgetActRevisited_34.pdf Page 15

[10] Train v. Campaign Clean Water, 420 U.S. 136 (1975) 420 U.S. 136

[11] <http://bancroft.berkeley.edu/ROHO/projects/debt/budgetcontrolact.html>

[12] <https://www.congress.gov/bill/93rd-congress/house-bill/7130>

[13] Op.Cit. HJackson, Page 20.

[14] <http://pgpf.org/issues/spending/2014/07/qa-congressional-budget-and-impoundment-control-act-of-1974>

[15] <http://www.gvpt.umd.edu/jgloekler/documents/contract.pdf>

[16] Stephen Moore; Testimony: Line Item Veto for the President; Subcommittee on the Constitution; Committee on the Judiciary; United States Senate; January 24, 1995.

[17] Ibid.

[18] <http://thomas.loc.gov/cgi-bin/bdquery/z?d104:SN00004>

[19] Supreme Court of the United States; Raines. Director, Office of Management and Budget, et.al. v. Byrd, et.al. Appeal from the U.S. District Court for the District of Columbia; No. 96-1671.

[20] Clinton v. City of New York, 524 U.S. 417 (1998)

[21] <http://www.heritage.org/research/reports/2006/03/the-presidents-proposed-line-item-veto-could-help-control-spending>

[22] <https://www.govtrack.us/congress/bills/109/hr4890>

The IRS' Reach Into Political Speech – Guest Essayist: Andrew Langer

The power to tax is the power to destroy. When Justice Marshall wrote these words in 1819 (echoing the words of Daniel Webster) he was expressing what could be considered a prophetic statement—those who have the power to tax wield enormous power over everyday lives, power that is apt to be abused.

This mistrust of those who hold the tax and power is nothing new. Looking back at the New Testament, those who witnessed Christ's acts noted the skepticism that abounded because among those Jesus surrounded himself by were tax collectors, who were commonly reviled.

But in the modern era, in the United States, the architects of the 16th amendment (the amendment that gave the federal government the power to directly tax income) were probably unaware of the potential for abuse that such power could create. The power of the Internal Revenue Service today is enormous, reaching into areas of American life never envisioned by those who initially created it, powers that exemplify the essence of executive branch overreach.

For many years, the abuse of power was straight-forward—even mundane. Politicians would use the IRS to bully or punish their enemies, either by illegally reviewing tax returns to find damaging information, or by targeting those enemies for auditing or tax-related legal action. President Nixon, for example, was accused of engaging in this behavior in the second article in the Articles of Impeachment that were drawn up against him.

It is the IRS' involvement in political speech, however, that has given rise to the greatest opportunities for its power to be abused.

The passage of the 1954 Internal Revenue Code formalized a variety of categories of not-for-profit organizations. While this section, 501C, applied to charitable organizations, it also

oversees groups involved in a variety of research, education, and public policy advocacy as well, the two most-known being 501C(3) groups and 501C(4) groups. “C(3)s” can study public policy, analyze it, and even engage in advocacy. But they cannot engage in electoral politics, and as a result, donations to these groups are tax-deductible.

501C(4) organizations, on the other hand, can engage in greater amounts of public policy advocacy, and can engage in the political process. This is why donations to them are *not* tax-deductible (and, conversely, the fact that donations to C(4)s are not tax-deductible is *prima facie* evidence that, contrary to those who are critical of such organizations, these groups can and do get involved in politics!).

Because individuals who create these kinds of organizations must (generally) seek approval from the Internal Revenue Service (in order to gain the benefit of not-for-profit status), it gives the IRS an incredible amount of power when it comes to the exercise of free-speech rights, rights to redress the government for grievances, rights to freedom of assembly (all rights guaranteed by the Constitution).

As we saw in the “IRS-Tea Party Scandals”, the IRS was able to be used as a tool (one of several, but perhaps the most-important) in efforts by the Obama Administration to stifle opposition speech. As people all across the country were inspired by the Tea Party movement and horrified at the prospect of Obamacare, hundreds of groups were created to speak out on these issues, many of whom took the step to apply to the IRS for tax-exempt status.

What we now know is that the IRS, possibly under orders from the White House, took the extraordinary measure of issuing guidance to put these organizations under greater scrutiny, to slow-down the approval of their applications and to put other organizations under the bureaucratic microscope. Some people waited years for their organizations to be approved (if they were approved at all), while others spent thousands of dollars to fight back against an operation whose goal was to silence them.

When caught, rather than apologize, the IRS took the arrogant step of attempting to codify the criteria they used to target these groups, and to peel back their ability to keep their donors away from the public eye. Understand, organizations such as these are under no obligation to make their donors public. They can, if they want to (and if their donors allow it), but most organizations recognize the importance of protecting the confidentiality of their supporters.

It all comes down to the reality that, in addition to abuses of power such as these, donors can (and are) harassed. It is something the Supreme Court recognized in 1958 in the case of *NAACP v. Alabama*—in which the High Court ruled that Alabama had no right to get the names of the NAACP’s donors (recognizing that Alabama only wanted these names so that those donors can be harassed).

Yet here we are, in 2015, and those in power are once again trying to get those names so that individuals can be harassed. The American Legislative Exchange Council is one organization whose donors have been under fire—and it is clear that someone at the IRS shared confidential donor information with members of Congress. And the IRS has been caught disproportionately

applying “gift tax rules” to conservative donors—something Congress is working to fix legislatively.

Thankfully, as the IRS was attempting to formalize the criteria they were using to target conservative groups, they were slapped by some unlikely adversaries. Despite the fact that an unprecedented number of individuals had submitted letters to the IRS in opposition to their 501C(4) rule changes (more than twice the number of *all* the letters submitted to the IRS during the previous seven years, combined!), the strongest opposition came from the NAACP itself.

Recognizing the enormous power of the IRS and the potential for that power to be abused, the NAACP was very clear: were the IRS to enact the changes they were proposing, it would criminalize much of the work of the NAACP.

The power to tax is the power to destroy—and the NAACP recognizes that those who have the power to tax wield enormous power over the rights of individuals, and that power must be constrained.

Andrew Langer is President of the [Institute for Liberty](http://www.institute-for-liberty.org), and host of the LangerCast, which can be found at [RELMNetwork.com](http://www.relmnetwork.com) (<http://www.relmnetwork.com/#!/langerpopp/cdo6>)

How Executive Overreach Affects Your Liberties – Guest Essayist: James Legee

Executive overreach often refers to the growth of the administrative state beneath the President, and whether it has grown beyond the Constitutional limits meant to ensure checks and balances, and protect the liberty of the people. When discussed in the media, among academics, and at dinner tables and coffee shops around the United States, attention is often turned towards the actions, or attempted actions, of the current White House resident. Debate over executive orders, signing statements, the limits of war powers, recess appointments, border security, healthcare, swirl and blend in a way such that those without an addiction to the news or a background in government, can easily become lost, or worse, turned off from what is happening in current events.

Functionally, and regardless of ideology, it is difficult to debate the fact that the presidency has overstepped the vision the founders had for the office, and the restraint on power the Constitution was intended to serve as. Missing from the discussion is that the presidency – both the office and the person – has more and more insinuated itself into the daily lives and workings of citizens. This goes well beyond, and began well before, movement politicians, like President Obama or Ron Paul’s attempts for the Oval Office.

Franklin Delano Roosevelt entered homes of Americans through thirty fireside chats, where a colloquial and sympathetic president spoke to a nation beset by economic woes and the spread of fascism. The contest for the White House changed forever in the televised Kennedy-Nixon debates.

In more recent times, candidates and presidents have used the media to enter the living rooms of millions of Americans and ask for votes, rally Americans to their policy agendas, and console the nation in times of turmoil. President Clinton played the saxophone and John McCain announced his candidacy on late night television. According to Mark Knoller at CBS, President Obama has appeared on late night shows nine times.

While the rise of television, the twenty-four hour news cycle, social media, and what seems to be a perpetual presidential campaign season help account for the ubiquity of the executive in the media; it fails to reveal a clear picture. Self-interest and access to the ruling elite aside, television, newspapers and internet companies exist to make money, and to do so they must provide what the customer demands. Is constant coverage of the executive what the citizens want, even as approval ratings of the president and government in general plummet and voter turn out remains dismal? Perhaps contemplating why this may be what the citizens want despite the languid, even hostile, views Americans have historically held towards concentrated power, will give us insight not only to the ubiquity of the executive in the media, but the growth of the imperial presidency.

For Gene Healy of the CATO institute in his book *The Cult of the Presidency* (building in part on the work of political scientist Theodore Lowi in *The Personal Presidency*) the cause comes with the ascent of progressivism as an ideology and governing doctrine in American politics. The presidency has had an increasingly messianic tone since the early twentieth century. This is perhaps explicit nowhere more than FDR's Second Bill of Rights, articulated in his 1944 State of the Union, where government becomes not the guarantor of negative liberties and a neutral arbiter, but rather, responsible for the material well being of every man woman and child in America. There are two major problems with this.

The first, and returning to Healy's excellent book, he points out

"the exultant rhetoric of the modern presidency is as much curse as blessing ... A man who trumpets his ability to protect Americans from economic dislocation, to shield them from physical harm and moral decay, and to lead them to national glory – such a man is bound to disappoint. Yet having promised much, he'll seek the power to deliver on his promises."

Such promises are impossible for a power short of a god to meet. However, with the New Deal, the Great Society and other exploits in social engineering, the chief executive has attempted just that. And we, the American people, have elected him to do so; more troubling are the implications of this.

Of greater concern to the welfare of a republic is that pinning such hopes, asking the executive and an army of well intentioned, but impersonal, bureaucrats to achieve such feats is corrosive to the self-government of the people. We must consider that self-government is not merely voting in November, not merely paying your taxes and putting a flag in your lawn. It is, at its most basic, and in the understanding of the founders, the act of regulating oneself. It is the pursuit of virtue – religious, Aristotelian, or otherwise – as an individual. This is the cornerstone of a free people.

FDR says in the same address “We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence. ‘Necessitous men are not free men.’ People who are hungry and out of a job are the stuff of which dictatorships are made.” This is perhaps true. Insecurity and desperation can drive men to seek security at any cost, a fact that Lincoln acknowledges in his speeches. However, dependency is also a form of tyranny.

Often quoted from Jefferson’s First Inaugural Address is his question, “Sometimes it is said that man can not be trusted with the government of himself. Can he then, be trusted with the government of others? Or have we found angels in the forms of kings to govern him?” The rapid growth in the executive should give the American people pause, as we contemplate what self-government is, rightly understood. If we cannot govern our own lives, can we expect other men to have such ability? History, as Jefferson says, will indeed answer the question for America.

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Federalism On Life Support: The Affordable Care Act And How It Affects You – Guest Essayist: Troy Kickler

Criticism abounds regarding President Barack Obama and executive overreach. To name one example, the Affordable Care Act (ACA), commonly known as “Obamacare,” has raised the ire of many Americans. Expansive government and centralized approaches to political issues, admittedly, started before the Obama administration, but current executive overreach has accelerated the size of the national government and threatens individual liberty. Various administrative divisions, whether classified as executive agencies or executive departments, such as the Environmental Protection Agency and the Department of Education, have been scrutinized, too. Through “the administrative state,” what some have labeled the “fourth branch of government,” the executive branch seemingly continues to have its fingerprints on more and more aspects of American lives.

Even though they may complain, many Americans still believe that the best answers come out of Washington, D.C. In particular, they wait for presidential solutions to America’s problems. If the current administration is ineffective or suggests bad policy, many Americans believe that replacing the President with the right man or woman—their candidate—will alleviate all of the nation’s problems. Even champions of limited government and critics of executive overreach ironically often seek top-down solutions and focus most if not all attention on the national level while placing an inordinate amount of unconstitutional significance on the executive.

The founders understood exceedingly well that power in the national government might accumulate in one place or in one person. So, they divided the general government into three branches: legislative, executive, and judicial. Articles 1-3 of the Constitution spell out the powers given to each branch; it is not coincidental that Article 1, the one listing the powers of Congress, the representatives of the people, is the longest article.

Throughout the Constitution, checks and balances are interwoven and are designed to keep one branch from having exclusive power, or “whole power.” For instance, the President also has a legislative role when making policy suggestions in the State of the Union address or when vetoing a bill. On the other hand, Congress has some power over the executive when overriding a veto or impeaching the President. The Senate, in particular, has authority to approve treaties and confirm judicial appointments. (These are only a few checks within two of the three branches.) According to constitutional scholar James McClellan in his magisterial *Liberty, Order, and Justice: An Introduction to the Constitutional Principles of American Government*, “The checks and balance system is probably the most ingenious and carefully crafted feature of the American Constitution” (331).

Although there are checks and balances in the national government, it is possible that the three branches can be walking lockstep in an unconstitutional direction. What is the “check” when all three branches seem to work together to empower the national government at the expense of individual freedom? The founders, to be sure, anticipated centripetal forces, so they further separated power with federalism.

The instructive Federalist #39 explains the federal nature of the American government. The final sentences read: “In its foundation it is federal, not national; in the sources from which the ordinary powers of the government are drawn, it is partly federal and partly national; in the operation of these powers, it is national, not federal; in the extent of them, again, it is federal, not national; and, finally in the authoritative mode of introducing amendments, it is neither wholly federal nor wholly national.”

Alexis de Tocqueville considered federalism the Constitution’s greatest achievement; it could promote prosperity and protect the “freedom of man.” Many Americans nevertheless forget or underappreciate this dual sovereignty aspect of the Constitution. As a result, they overlook how states can push back against oppressive or encroaching national government and executive overreach. (Political scientist John Dinan of Wake Forest University has written about this approach in a 2013 CATO Policy Analysis titled “How States Talk Back to Washington and Strengthen American Federalism.”) Forgetting about federalism not only overlooks plausible societal and political solutions but also unwittingly contributes to a growing, modern notion that one office—President of the United States—should address all problems.

Like checks and balances, federalism is interwoven in the Constitution. Indeed, powers are given and denied to the national government, and states are prohibited from certain activities. The unmentioned powers are left to the various states. Here is a particular example of interlacing federalism in the Constitution: The presidency is part of the federal concept, for the Electoral College elects the President. As a result, much emphasis is placed on states during a presidential election.

Although federalism’s importance has declined in the United States, debate still continues where exactly state power begins and national power ends. Americans need to remember that federalism can be a “check” on centralization and executive overreach. There are advantages to federalism, writes James McClellan, and one of them is that “obedience to all orders from a national capital is not automatic.” “Federalism,” McClellan continues, “makes it difficult for an

unjust dictator or fanatical political party to seize power nationally and rule the whole country arbitrarily . . . Totalitarianism cannot succeed where federalism thrives” (318-19). In a federal context, then, local and state elections and politics are also ones of national importance, and federalism allows for innovative and informed approaches to our nation’s particular problems.

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The Imperial Obama Presidency and the Demise of Checks and Balances – Guest Essayist: U.S. Senator Ted Cruz

Under President Obama, America has witnessed an unprecedented expansion of presidential power. This is not merely the observation of political opponents. Liberal law professor Jonathan Turley—who voted for President Obama—has reached the same conclusion: “We are seeing the emergence of a different model of government in our country—a model long ago rejected by the Framers.”[1] “What’s emerging,” according to Professor Turley, “is an imperial presidency, an über-presidency . . . where the President can act unilaterally.”[2]

President Obama frequently claims power to act when Congress will not, as though his powers are somehow enlarged the moment Congress refuses to address his priorities. “I take executive action,” said the President, “only when we have a serious problem, a serious issue, and Congress chooses to do nothing.”[3] He repeatedly threatens that “if Congress won’t act, I will.”[4] Frustrated by Congress’s refusal to enact his agenda or by laws that he simply finds to be inconvenient, President Obama has too often resorted to unilateral executive action to override acts of Congress or to implement policies that he was unable to enact through the proper constitutional process. Many examples are documented in a series of reports I authored last Congress[5] and in a recent law review article titled “The Obama Administration’s Unprecedented Lawlessness” in the Harvard Journal of Law and Public Policy.[6]

At any other time in our history, it would have gone without saying that this is not how our system of government works. Article I of the Constitution vests Congress, not the President, with the sole power to legislate. Article II, by contrast, charges the President with the responsibility to “take Care” that the laws enacted by Congress be “faithfully executed.” Given this division of power, the President cannot act until Congress does. But President Obama sees congressional inaction, not as a limitation on his power to act, but as a license to act. This is the logic of Caesar, not the logic of a president in a constitutional republic.

The Framers built checks and balances into the Constitution to prevent the President or any other branch of government from consolidating and wielding all power. “The accumulation of all powers . . . in the same hands,” wrote James Madison in *The Federalist No. 47*, is “the very definition of tyranny.”[7] But these checks and balances have failed to stop President Obama’s lawlessness.

The reason for this failure lies in Congress’s refusal to fulfill its constitutional role. For far too many members of Congress, partisan loyalty to the President and ideological commitment to his

goals outweigh any interest in asserting their own institutional rights and prerogatives as the people's representatives. They are all too willing to hand power over to the President.

This is not what the Framers envisioned. According to Madison in *The Federalist No. 51*, “the great security against a gradual concentration” of power in one branch of government lies in giving the members of each branch “the necessary constitutional means, and personal motives, to resist encroachments of the others.”[8] “Ambition must be made to counteract ambition,” he said.[9] But Madison did not expect that members of Congress would be motivated less by personal motives and ambition than by partisan loyalty and ideology. So long as the latter trump the former, the Constitution's checks and balances cannot work as Madison had hoped. A Congress populated with enough partisans of the President—not to mention those who simply lack commitment to defend their constitutionally appointed role—will not stand up to the President, even as he takes their power away.

In the absence of a functioning system of checks and balances, the only way to put a stop to presidential lawlessness is for the American people to rise up and demand it. Despite his faith in the “auxiliary precautions” of checks and balances, even Madison understood that the people are ultimately “the primary control on the government.”[10] That means that the people must hold their representatives accountable when they fail to uphold their oaths and perform their constitutional duties.

President Obama's reign will soon come to an end. To ensure that the imperial excesses of the Obama presidency are never repeated, the people must elect constitutionalists—those who will respect and adhere to the constitutional design above all else, including party loyalty and ideology. The future of our constitutional order, which secures our liberty, depends on it.

In the twilight of the Roman republic, Cicero wrote the following: “The Republic, when it was handed down to us, was like a beautiful painting, whose colors were already fading with age. Our own time has not only neglected to freshen it by renewing its original colors, but has not even gone to the trouble of preserving its design and portrayal of figures.”[11] Let the same not be said of us.

The Honorable Ted Cruz is the 34th Senator from Texas, elected in 2012. He serves on the Senate Judiciary Committee's Subcommittee on the Constitution. He is the former Solicitor General of Texas, and a former Adjunct Professor of Law, teaching U.S. Supreme Court Litigation at the University of Texas School of Law, from 2004-2009. He has also served as an Associate Deputy Attorney General at the U.S. Department of Justice, and as a law clerk to Chief Justice William Rehnquist on the U.S. Supreme Court.

[1] Authorization to Initiate Litigation for the Actions by the President Inconsistent with His Duties Under the Constitution of the United States: Hearing Before the H. Rules Comm., 113th Cong. (2014) (statement of Jonathan Turley, Professor, The George Washington University Law School), available at <http://docs.house.gov/meetings/RU/RU00/20140716/102507/HMTG-113-RU00-Wstate-TurleyJ-20140716.pdf>.

[2] Greg Richter, *Jonathan Turley: America Becoming 'Imperial Presidency,'* Newsmax (June 4, 2014), <http://www.newsmax.com/Newsfront/Jonathan-Turley-Obama-presidency-power/2014/06/04/id/575014/>.

[3] Transcript, President Obama's June 30 Remarks on Immigration, Wash. Post (June 30, 2014), http://www.washingtonpost.com/politics/transcript-president-obamas-remarks-on-immigration/2014/06/30/b3546b4e-0085-11e4-b8ff-89afd3fad6bd_story.html.

[4] Charles C.W. Cooke, *The 'We Can't Wait' Clause*, National Review (Aug. 28, 2014), <http://www.nationalreview.com/article/386613/we-cant-wait-clause-charles-c-w-cooke>.

[5] Senator Ted Cruz, *The Legal Limit: Reports on the Obama Administration's Lawless Abuses of Power*, <http://www.cruz.senate.gov/lawless/>.

[6] Senator Ted Cruz, *The Obama Administration's Unprecedented Lawlessness*, 38 Harv. J. L. & Pub. Pol'y 63 (2015), http://www.harvard-jlpp.com/wp-content/uploads/2015/02/Cruz_Final.pdf.

[7] The Federalist No. 47, at 244 (James Madison) (Gary Wills ed., 1982).

[8] The Federalist No. 51, at 262 (James Madison).

[9] Id.

[10] Id.

[11] Anthony Everitt, *The Rise of Rome: The Making of the World's Greatest Empire* 403 (Random House 2012).

The Geneva College Case: Edelweiss and Rights of Conscience Today— Guest Essayist: Kevin Theriot

This year marks the 50th anniversary of the opening of *The Sound of Music*, a sweet love story built around the somewhat grittier sub-plot of Nazi Germany's annexation of Austria in the late 1930s. The movie is actually based on the true story of an Austrian naval hero – Captain Georg von Trapp – who opposes the Nazi Anschluss and refuses to accept a commission in the German navy. He takes a stand near the end of the movie by singing the patriotic song “Edelweiss” at a local festival. The song summons all Austrians who love freedom to stand by their convictions and refuse to violate them, even when being coerced by an out-of-control executive.

This somewhat cheesy but extremely entertaining musical is a great example of what happens when the executive branch of government gains so much power that it feels free to violate the freedoms of an individual and a whole nation. Freedom of conscience is so important it is enshrined in the very first amendment to the United States Constitution. And our Founding Fathers thought freedom from government coercion so vital that they built it into the very

structure of our government. Power is split between three coequal branches – legislative, executive, and judicial – to keep dictatorial officials like Herr Zeller in check.

When that delicate balance is out of kilter, freedom suffers. Unfortunately, that is happening right now in the United States. When passing the Affordable Care Act (often referred to as Obamacare), Congress delegated to the Department of Health and Human Services (part of the executive branch) the power to both make the rules – Congress’s job – and enforce them. HHS is using that power to force religious organizations like Geneva College, a Christian school in Pennsylvania, to include abortion-causing drugs in their insurance plans. This violates the school’s convictions just like being part of the German war machine violated Captain von Trapp’s. The school believes this is a grave sin and has brought suit seeking relief under our laws protecting freedom of conscience.

Other similar religious organizations have been successful in their lawsuits as courts recognized that freedom of conscience is vital to our democracy and that the executive branch is wrong to fine them if they refuse to violate their conscience. Regretfully, the appeals court hearing Geneva College’s case was not convinced. The school is now seeking relief before the United States Supreme Court.

Some may argue this is very different than Captain von Trapp’s situation. The government is not actually forcing the good folks at Geneva College to use abortion-causing drugs. But many who served in the German armed forces did not support Hitler and never joined the Nazi Party (as was apparently the case for Field Marshal Rommel, for instance). Their service nevertheless supported the Nazi cause. That is why Captain von Trapp’s conscience did not allow him to serve – even under protest. Geneva College’s conscience similarly prohibits it from being involved in facilitating the use of abortion-causing drugs in any way – even indirectly.

Both crises of conscience are a result of government executives seizing or being delegated too much power. When legislators properly exercise their power to promulgate rules, they are much more likely to be sensitive to individual rights like freedom of conscience. They are directly elected, not appointed by the president.

Coerced violation of conscience is the calling card of unfettered executives throughout history. Our founders knew this and did their best to keep our leaders from succumbing to the same dictatorial tendencies of King George. Likewise, we intuitively know it was wrong for the German high command to force Captain von Trapp to leave his seven children and new wife to serve a regime he opposed.

His defiant singing of “Edelweiss” reminds all of us who love freedom that no government official should be given unfettered power to force individuals to violate their conscience. It also reminds us that our convictions mean nothing if we do not stand by them – even at the risk of loss of home and livelihood.

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Can Congress Stop Federal Agencies From Running Riot Over Your Liberties? Yes. – Guest Essayist: George Landrith

News reports of federal agencies abusing the rights of Americans and violating the law have become all too common. It is no longer plausible for defenders of big government to argue that these abuses are simply a few isolated incidents. We have witnessed a veritable parade of lawless abuses from all corners of the federal government.

For most of the last six years, the Senate ran interference for the Administration and the national media largely ignored the abuses of their ideological allies. But even in this dangerous and unaccountable age, the Constitution's genius divides power in such a way as to limit the abuse of power — provided we are smart enough to rely upon the wisdom of the Constitution.

The Internal Revenue Service (IRS) systematically targeted conservative groups seeking nonprofit status. But when caught, top officials lied about it under oath, and destroyed evidence in violation of the law. The Administration agreed to “investigate” the matter and assigned a high dollar Obama donor to oversee the investigation. This does not even pass the laugh test and is simply more evidence that the federal government has become corrupt and is abusing its power and our rights.

While less well known, the IRS also sent out letters to donors of conservative nonprofit groups informing them that their donations might be subject to the estate and gift tax. This, of course, has never been the law and donors of liberal groups were not threatened with the imposition of another tax on their contributions. But the point was to discourage donors from giving to conservative causes. This — just like the more well-known IRS violations of law — is criminal. Yet, these deeply abusive and illegal actions are what define the IRS in the 21st Century. Now, the IRS seeks to get the law changed so that the abuses and illegalities of the past six years will be legalized and formalized. This is compelling evidence of how thoroughly corrupt the leadership at the IRS has become.

The Environmental Protection Agency (EPA) has asserted regulatory powers clearly denied it in the law. A top EPA official, Al Armendariz, likened his enforcement philosophy to the practice of ancient Roman soldiers who in recently conquered territories crucified random victims simply to instill terror in the populace and gain their fearful cooperation. Let that sink in for a moment. Not in North Korea, but in *America*, a government official bragged that his enforcement philosophy mirrors the ancient practice of torturing and executing people simply to subjugate the populace to their authority. Interestingly, the corrupt mainstream media said he “didn’t mean his comments to sound quite how they did.”

Even the liberal Washington Post editorial board had to concede that “The EPA is earning a reputation for abuse.” To make matters worse, EPA Administrator Lisa Jackson contrived an illegal ruse and a fake identity — Richard Windsor — as her email alter ego so that she could conduct illegal EPA business in secret and avoid both public disclosure and congressional oversight of her agency's illegal actions.

In the Eastern District of New York, the U.S. Attorney's office violates the law, abuses its

discretion, and systematically denies victims of massive fraud schemes their legal right to restitution while aiding the criminal to keep his guilt out of the public eye making it easier for him to find new victims and repeat his crimes. To make matters worse, the government does all of this in secret and hopes to silence those who seek to bring these abuses to light.

Loretta Lynch who now seeks confirmation as the next Attorney General of the United States oversaw and participated in these abusive and even illegal practices as both the *Acting* U.S. Attorney and then as the *actual* U.S. Attorney for the Eastern District of New York. When asked about these practices in written questions after her confirmation hearings, she dissembled and misrepresented her role in those abuses. These attempts at deception not only show her contempt for the law and the Senate, but also are strong evidence of her own conscienceness of guilt.

The pages of many books could be filled recounting examples of abuses perpetrated by federal government agencies. Some of the abuses are raw power grabs where agencies assert powers they simply do not constitutionally possess. Other abuses involve federal agencies misusing the awesome power of government to single-out and punish political opponents or reward political allies. Sadly, there is now a widespread culture of corruption and abuse.

The sad fact is when power is obtained, it is all too often misused. This is why the Founders placed limits on government and built in so many checks and balances. They understood that power was likely to be abused. They mistrusted government power and understood that once in power, people tend to grab for more power and misuse the power at their disposal. Therein lies the genius of the Constitution — it divides power and builds in many checks and balances.

It would be foolish to trust this Administration to curb its own abuses. At the very least, it is the primary beneficiary of the abuses. And at worst, it is entirely possible that the highest levels within the administration formulated and directed these abuses. Certainly, the unprecedented stonewalling and even the systematic and active protection of those who were caught red-handed in the abuses only raises more serious questions.

Congress must actively use its constitutional powers to reign in the abuses of rogue federal agencies. The power of the purse, the powers inherent in congressional oversight, and new legislation must be used aggressively to punish abusive agencies for their abuses and crimes and prevent future occurrences. Agency officials who violate the law, must be held personally accountable. In the business world, businesses and executives who break the law are held accountable. There is no reason why government should be held to a lower standard than business. Yet, today they are held to almost no standard at all.

If Lois Lerner, who oversaw many of the IRS's worst abuses, had ever believed that she might lose her home and retirement, and go to jail for systematically abusing the awesome power of the federal government to violate the fundamental Constitutional rights of so many Americans, she would not likely have been so quick to trample on those rights. But because she saw it as a riskless endeavor, she was willing. And so far the Administration has protected her from accountability for her crimes.

Congress must use the full measure of the powers given it in the Constitution to combat the

abuses of the executive branch. Things have simply gotten too far out of hand to hope that a few embarrassing headlines will shame these serial abusers into behaving in a lawful fashion. Anything short of aggressive action by Congress will only result in more abuses. That is precisely why the Founders drafted the Constitution as they did — power is divided and shared so as to make it more difficult for power to be abused — provided those who have some of that shared and divided power will act upon it.

But the truth is, in a representative democracy, we generally get what we deserve. So why do we have so much abuse of power? Ultimately, because the people put up with it and actively side with those who champion abusive government. We cannot decry government abuses on the one hand, and on the other, decry those who use our constitutional system of checks and balances to stop those abuses. Yet, that is precisely what the profoundly corrupt mainstream media does. And sadly much of the populace foolishly follows suit.

The Founders expected the branches of government to keep each other in line. Those contests between the executive and legislative branches would naturally involve friction and even some rough politics at times. But that was all by design and far better than settling such disputes by violence or anarchy or by giving in to those who abuse power and trample on the people.

If America wants good government, it must be willing to accept some dynamic and even contentious political battles between the branches. But if the media and the public mindlessly insist that everyone simply “get along,” then they sow the seeds of the demise of their own freedom. And they become the despot’s strongest ally.

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**From President Bush’s Iraq Invasion & Patriot Act to President Obama’s
Immigration Amnesty & Minimum Wage Hike: The Roots of Executive
Overreach in Lincoln & Roosevelt’s Administrations – Guest Essayist:
Paul Schwennesen**

Oh, how we fret! Rightfully, of course, for nothing is more frightening to the American Mind than the specter of overweening authority. During the second Bush Administration, the Left was beside itself with concern over executive overreach (from the Iraq invasion to the Patriot Act) and now, during the Obama Administration, the Right is beside itself with concerns about usurped power (from the federal minimum wage hike to Immigration amnesty). It is good to highlight the tendency of Presidents to overstep their constitutional bounds—but emphasizing it risks ignoring a far deeper and more insidious problem: the immense and pernicious power of Administrative Despotism. While we focus in animated concern upon the head of the snake, we forget the innumerable coils that already surround us.

Alexis de Toqueville, our keenest observer, worried that Democracies would fall victim to an “administrative despotism” in which:

[The supreme power] covers the surface of society with a network of small complicated rules,

minute and uniform, through which the most original minds and the most energetic characters cannot penetrate, to rise above the crowd. The will of man is not shattered, but softened, bent, and guided: men are seldom forced by it to act, but they are constantly restrained from acting.^[i]

Presidents are often the levers that open the way to a public conciliation with administrative overreach. Two of our most famous – Lincoln and Roosevelt, exemplify this. Lincoln, for his part, is responsible for convincing America that violence was the natural prerogative of the State. Theodore Roosevelt, meanwhile, acquainted America with the concept of a paternalistic and provisionary government. The road to Administrative Despotism was surveyed and graded by two of our brightest historical stars. Our current hand-wringing over presidential extravagance is mere fluff — like wondering what color to paint the road signs.

The first really binding coils of administrative despotism were laid, of course, by Lincoln. Yes, Lincoln, the most venerable in our pantheon of secular saints. Lincoln *personified* Hamiltonian visions of monarchical power. Like Hamilton, Lincoln was a natural aristocrat who, despite his woodsy façade, believed that only the most gifted and experienced were entitled to rule. Jefferson and the Second American Revolution had held Hamiltonian ambition in abeyance, but with Lincoln the coils of the administrative state were wrapped in earnest.

The Lincoln of 1848 who had declared that: “Any people anywhere, being inclined and having the power, have the right to rise up, and shake off the existing government...” was not the same Lincoln who prosecuted a war against “insurrectionary” States in 1861:

I hold that, in contemplation of universal law, and of the Constitution, the union of these States is perpetual....It follows....that no State, upon its own mere motion, can lawfully get out of the Union..and that acts of violence, within any State or States, against the authority of the United States, are insurrectionary or revolutionary...

In the crucible of the Civil War, Lincoln forever cleaved the use of violent force with the central authority. From that moment, voluntary association became an abstract concept instead of a foundational principle. Altering the form and scope of the State thenceforth would be subject to the approval of the State itself.

Theodore Roosevelt, meanwhile, introduced America to the notion of an active, provisionary government. Under his administration, government evolved from a negative institution that *prevented* things (trespasses between citizens, invasion from without) to a positive institution firmly in the business of *doing things*. Great big, important, exciting things. Projects that would make any six-year old boy thrill. To make this a reality, Roosevelt had to lay aside the chafing framework of the Constitution. He was dismissive and genuinely puzzled by courts that showed an obstinate “adherence to outworn, to dead and gone systems of philosophy.”

TR experimented with novel “interpretations” of constitutional power. In 1902, during a col-miners strike, he decided to use federal troops to confiscate mines in order to give strikers the raise they demanded. When members of his own party were outraged, he responded vigorously, implying that the Constitution was a mere formality, that, “The Constitution was made for the people,” he responded, “not the people for the Constitution.”

By 1912, in his Progressive Party platform speech (seeking an unprecedented third term), he laid out a vision for an active, provisionary state which supports:

...any form of social justice, whether it be securing proper protection for factory girls against dangerous machinery, for securing proper limitation of hours of labor for women and children in industry, for securing proper living conditions for those who dwell in the thickly crowded regions of our great cities, for helping, so far as legislators can help, all the conditions of work and life for wage-workers in great centers of industry, or for helping by the action both of National and State governments, so far as conditions will permit, the men and women who dwell in the open country to increase their efficiency both in production on their farms and in business arrangements for the marketing of their produce and also to increase the opportunities to give the best possible expressions to their social life.

A government with a participatory interest in so many disparate fields of human affairs was a radical departure from the constitutional one that guaranteed Natural Rights alone.

Though Lincoln and Roosevelt have made the American Project immeasurably more difficult by desensitizing the electorate to presidential overreach, all is not lost. The American Mind is alive to the danger of imperial ambition. We see shadows of kings and specters of emperors over our hallowed horizons; and our hearts recoil.

Paul Schwennesen is a southern Arizona rancher and director of the Agrarian Freedom Project.

[i] Alexis de Tocqueville, *Democracy in America*, Vol. 2, Part IV, Chapter VI. <http://www.gutenberg.org/files/816/816-h/816-h.htm#link2HCH0010>

How Did Executive Overreach Come About? How Was It Excused? Woodrow Wilson's Role.... – Guest Essayist: Professor Will Morrissey

In late January 1904 the president of Princeton University stepped to the podium of The Outlook Club in Montclair, New Jersey. Today, university presidents get into the news when some scandal erupts, but at the beginning of the last century they often enjoyed the status of what we now call “public intellectuals”—frequently quoted in the newspapers on the issues of the day, looked to for solutions to economic and social problems. Nicholas Murray Butler at Columbia, Charles William Elliot at Harvard, and Arthur Twining Hadley at Yale were well-respected national figures. The Outlook Club was exactly the platform for such a person; possibly named after *The Outlook*, a prominent magazine featuring literary and political commentary associated with the several “reform” movements of the day, the Club afforded its speakers an audience of university-educated civic leaders who used their influence to promote “good government”—by which they first intended government free of corruption and of the party “bosses” associated with it, but which would soon coalesce into something still more ambitious: Progressivism.

As readers of *Constituting America* begin considering the use and abuse of executive power under the sitting president and many of his recent predecessors, it's not a bad idea to step back

for a minute and consider the origins of this startling expansion of executive rule, an expansion not authorized by any fair reading of, say, the United States Constitution, where executive power is enunciated. While it is unquestionably true that American presidents from time to time exceeded their Constitutional authority—Thomas Jefferson admitted as much in making the Louisiana Purchase—such overreaching typically occurred because some national emergency or other extraordinary circumstance had arisen. (Jefferson, citing the importance of New Orleans to the commercial prosperity and military security of the middle of the North American continent, refused to hesitate to make a bargain with the French despot who by then was calling himself Napoleon I, knowing that that tyrant’s vast military ambitions in Europe had opened an opportunity for America on this continent that might never arise again—the possibility of peaceably obtaining possession of a huge parcel of invaluable farmland overlain with a river system that emptied into the Gulf of Mexico. This was a prize that Napoleon himself could not win in Europe at the price of his own Grande Armée, but Jefferson could win it here at the cost of four cents an acre.) But such circumstances were understood to be rare, and in need of public justification.

What we see now is a much more *routine* use of executive action that effectually usurps the actions of the legislative branch. How did this come about? How was it excused?

The speaker at the Outlook Club that night was Woodrow Wilson, who had been appointed to the presidency of Princeton two years earlier after a distinguished scholarly career at the Johns Hopkins University. Wilson was already one of the most prominent members of the Progressive movement, coming to the attention of his peers for his studies of, and advocacy for, professional or “scientific” administration of the American state, in imitation of German and French models. And of course he would use the presidency of Princeton as a springboard to the governorship of New Jersey and then to the White House—a career path that seems quite implausible to us, today, but only because we no longer lionize our university presidents as we did then.

The title of Wilson’s talk was “Our Elastic Constitution.” His argument was simple. “The Constitution is like a snug garment stretched to cover so great a giant as the nation has become. If it wasn’t stretched it would tear.”

With the closing of the American frontier “less than fourteen years ago,” in 1890, America has not stopped growing. Not only had it acquired the Hawaii, the Philippines, and other far-flung territories, it had embarked on a vast project of industrialization and urbanization. “The American is skeptical of impossibility, he is ready for anything. He admits theoretical impossibilities, but has never found them actual.”

Well, actually it had, as Wilson well knew. The attempt at reconstructing the regimes of the former slave states in Wilson’s native Southland had met with mixed success at most. But that was in a way Wilson’s point, unspoken on the occasion of his Montclair speech but forthrightly advanced on other occasions. “Certain it is that statesmanship has been steadily dying out in the United States since that stupendous crisis during which its government felt the first throbs of life,” Wilson had written, years earlier. Notice that the vitality of the *government* began not with independence in 1776, not with the Articles of Confederation in 1778, nor even with the ratification of the Constitution in 1789, but only during the greatest national *emergency* since the

founding—the Civil War. And government soon went dormant thereafter.

But meanwhile, the *country* not only lived but grown robustly, both in population and in territory, throughout the nineteenth century. Only a strong executive, “vouchsafed the freedom of Prerogative, which must include the power of supplementing as well as of shaping the law to fit cases,” can make the office of the presidency worthy of the energies of great men—or, as Wilson had come to call them “*leaders of men.*”

Twentieth-century American will choose as its president a man judged by the people to “understand his own day and the needs of the country, and who has the personality and the initiative to enforce his views both upon the people and upon Congress.” Under twentieth-century conditions, the executive and not the legislative branch has “the most direct access to [popular] opinion,” and therefore “the best chance of leadership and mastery,” unimpeded by the confusion and contradiction of legislative debate. “[B]ecause he has the ear of the whole nation and is undoubtedly its chosen spokesman and representative, the President may place the House at a great disadvantage if he chooses to appeal to the nation.”

The ever-growing American nation, then, was held by the Progressives to *need* a leader, a person to focus public opinion and to act decisively not only to express but to guide it. President Obama is the latest example of this line.

The difficulty lies in the definition. When you get right down to it, a real constitution must actually *constitute* something. But if the constitution is defined by its elasticity, it no longer constitutes. Spandex may show off one’s best features or (as often) cover a multitude of sins. But it constitutes nothing. An elastic constitution shows off or covers up the will of the president, the Supreme Court, the Congress, the federal bureaucracy. It no longer limits their actions. And so we have what we have.

Will Morrissey holds the William and Patricia LaMothe Chair in the United States Constitution at Hillsdale College; his books include Self-Government, The American Theme: Presidents of the Founding and Civil War and The Dilemma of Progressivism: How Roosevelt, Taft, and Wilson Reshaped the American Regime of Self-Government.

Power To The Regulators! – Guest Essayist: James D. Best

The Founders believed that consolidating executive, legislative, and judicial powers would threaten liberty, so to avoid this tragedy, they built our constitutional framework with checks and balances. James Madison, the Father of the Constitution, wrote in Federalist 47 that “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”

Whew! Thank goodness we avoided that kind of government.

On second thought, we didn’t. Despite the Founders best efforts, Congress has concentrated

executive, legislative, and judicial powers into regulatory agencies. Lazy legislators pass vague laws and then permit regulators to fill in the devilish details. Many of these regulatory agencies employ their own adjudication panels with internal appeal boards that judge the rightness or wrongness of their own actions. (A final appeal may be made to outside courts, but usually not until all of the agency's protocols have run their course.) Lastly, regulatory agencies execute their own interpretation of laws, with—if White House responses to regulatory scandals are to be believed—no oversight by the top executive.

Surely, this can't be right. It would violate every precept of the Founders. Unfortunately, it's true. In fact, amassing vast powers in regulatory agencies has become so commonplace, few take notice anymore. At least, few took notice until the Consumer Financial Protection Bureau raised this liberty-sapping drift to a brand new level.

The Dodd-Frank Wall Street Reform and Consumer Protection Act created a committee, a study group, and a powerful regulatory agency. (Respectively, the Financial Stability Oversight Council, the Office of Financial Research, and the Consumer Financial Protection Bureau.) The Consumer Financial Protection Bureau (CFPB) has been assigned regulatory authority over more than twenty major laws, and the Dodd-Frank Act press-ganged civil servants from the Federal Reserve, the Federal Trade Commission, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and the Department of Housing and Urban Development.

The CFPB operates as an independent regulatory agency that can draw money from the vast coffers of the Federal Reserve. How much? Whatever the CFPB director deems "reasonably necessary," although the amount is capped at a stingy 12% of the Fed's own prolific spending. This agency has its own source of money, broad powers over the most vital sector of the economy, and is so independent that the Dodd-Frank Act even puts restrictions on the president's authority to dismiss the director. Congress does get periodic reports and testimony, but naked the power of the purse, all it can do is listen and grouse a bit. The Fed is prohibited from interfering and although the Financial Stability Oversight Council may issue a "stay" to the CFPB, it requires an appealable 2/3 vote. A high hurdle, indeed.

In other words, CFPB wields an absurd amount of power, sets its own budget, and is beholden to no one.

How could this possibly go wrong?

Well, how about this for starters.

- The CFPB feels empowered to collect whatever financial data it judges necessary, including credit card transactions. The US Chamber of Commerce claims the CFPB needs a warrant or National Security Letter to demand account-level data, but the CFPB is proceeding anyway.
- The cost to remodel the CFPB's new home has soared from \$55 million to \$145 million—more per square foot than the Trump World Tower, the Bellagio Casino, or the Burj Khalifa in Dubai. Worse, through good planning or bad, one-third of CFPB's employees won't fit in the lavish digs across from the White House. The CFPB is stonewalling

FOIA requests about these overruns from newspapers and political groups.

- Dodd-Frank gave the CFPB subpoena power, but the agency insists that regulatory precedents brush aside the statute of limitations and nondisclosure agreements.
- As if the CFPB didn't have enough control over the financial sector, the Financial Stability Oversight Council claims that insurance companies also fall under the agency's purview. MetLife, in its court filing, stated "That conclusion was arbitrary and capricious, conflicts with the council's statutory obligations under the Dodd-Frank Act and the rules and guidance that the council promulgated for designating nonbank financial companies, and was reached through a procedure that denied MetLife its due process rights and violated the constitutional separation of powers."

None of this includes the CFPB regulatory dictates that are hampering our economic recovery. Of course, financial service providers may request a review of adverse findings. The reviewing committee is comprised solely of CFPB officials whose conclusion is reviewed by the Associate Director. The decision of the Associate Director is final, and the CFPB will not accept further appeals.

This is a very busy regulator that has startled people with the speed with which it got up and running in just a few short years. Is there hope for Congressional action to corral the most grievous CFPB excesses? If the hearings on the headquarters remodel overruns are an example, the answer would be no. The Consumer Financial Protection Bureau demonstrated its independence by ignoring the huffing and puffing of mere elected representatives.

The consolidation of legislative, executive, and judicial powers in regulatory agencies would have offended the Founders. Our complacency would sadden them.

James D. Best, author of [Tempest at Dawn](#), a novel about the 1787 Constitutional Convention, [Principled Action](#), and the [Steve Dancy Tales](#).

Do You Know How Many Wars Congress Has Formally Declared War In? **HINT: It's Fewer Than You Think – Guest Essayist: Tony Williams**

On December 7, 1941, Japan bombed Pearl Harbor and killed 2,500 American servicemen. Japan's ally, Germany, followed up the attack by declaring war on the United States. Just after noon on the following day President Franklin D. Roosevelt addressed the shocked members of Congress and told them that the sneak attack was a "date which will live in infamy." The Congress declared war on Japan by an 82-0 vote in the Senate and nearly unanimous vote of 388-1 in the House. When Japan's allies, Germany and Italy, declared war on the United States, Congress responded in kind on December 10. World War II became the last war in which the United States declared war against a foe.

Roosevelt and Congress correctly followed the procedure as outlined in Article I, section 8 of the Constitution. The Founders gave the people's representatives the power to deliberate as a body as to whether the country should go to war and put its young men (and later its young women) in harm's way. The lines of authority were delineated clearly. The Congress would declare war,

the president would act as the commander-in-chief of the armed forces, and the Congress would authorize and appropriate money to fight the war. With the principles of separation of powers, checks and balances, and limited government, the idea that one person would have the authority to declare and then conduct the war was anathema to the constitutional order the Founders created.

More than 100,000 Americans have lost their lives and hundreds of thousands have been wounded in battle since World War II, but Congress has not declared war. Various euphemisms have been used to describe the wars such as “police action,” but the brave young men who braved the lethal cold in Korea, fought in the jungles of Vietnam, or invaded of Afghanistan and Iraq were armed with M-16s and flew in fighter jets rather than carrying badges. In these cases and others, there was indeed a congressional authorization for the president to use force – thereby preserving at least a modicum of the principles of the Constitution – but several of these such as the Gulf of Tonkin Resolution or WMDs in Iraq were passed under questionable circumstances. In launching the Korean War, President Harry Truman actually sought authorization from an international body, the United Nations (as did George H.W. Bush and Bill Clinton).

Although the cases of the president sending troops into harm’s way expanded exponentially in the twentieth century, the precedents were admittedly set in the new republic. Within twenty years of the Constitution being ratified as the law of the land, armed American ships were battling Britain and France as well as the Barbary Pirates to defend American rights and sovereignty, and John Adams fought a naval war and started mobilizing an army in the Quasi-War with France. However, although there were eighteenth and nineteenth-century examples of Americans fighting without a declaration of war, they were relatively few compared to the twentieth century. It seems as if not a year goes by in the last fifty years without American troops being dispatched around the globe by presidents of both parties to fight in undeclared wars. Nor did the 1973 War Powers Resolution reverse the situation since it simply laid down more stringent guidelines in which Americans could fight abroad without a declaration of war. It barely reined in what was called the “imperial presidency” which amassed power at the expense of the other branches.

Most recently and shocking in the debate over congressional authorizations of war, President Barack Obama has repeatedly made the argument during interventions in Libya and Syria, and against ISIS, that he does not even need congressional authorization to engage American troops in war. Although he eventually sought that authorization in February, 2015, against ISIS, President Obama did it only after American forces were engaged and for seemingly political reasons rather than a respect for constitutionalism. He did not receive that authorization and is ironically using the 2001 and 2003 authorizations for the Bush Administration that he has so fiercely denounced. By making the argument that a president need not even seek congressional authorization for war let alone a formal declaration, President Obama has gone far beyond his predecessors and threatens constitutional principles.

The U.S. Congress has only declared war in five wars in the country’s history – the War of 1812, the Mexican War, the Spanish-American War, and World Wars I and II. Some of those votes were close and revealed divisions over whether the country should go to war. We should not

fear deliberation among the people's representatives over whether to send servicemen and women into harm's way. Since 1945, the U.S. has fought some of its longest wars without following the constitutional principle that the Congress must declare war. Now, the current president is arguing he doesn't need the Congress to act and that he can act unilaterally. This is a violation of the letter and spirit of the Constitution.

Tony Williams is the author of five books including the forthcoming Washington and Hamilton: The Alliance that Forged America.

How Can Words On Parchment Constrain Executive Overreach? Guest Essayist: James D. Best

"Governments are instituted among Men, deriving their just powers from the consent of the governed." The Declaration of Independence used these words to legitimize our founding as a nation. Fifteen simple words, but they embodied a world-shattering idea. Kings supposedly derived their authority from God, but the Declaration declared that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." These subversive words flipped the divine right of kings on its head. Instead of kings, God endowed all of mankind with natural rights.

Words can be powerful.

That is, unless they're ignored. The Constitution is the "supreme law of the land," but many don't accept that enumerated powers limit government action. Elected officials "solemnly swear ... to preserve, protect and defend the Constitution of the United States," but many view the words as cant uttered during a swearing-in ritual. Lesser laws are based on a reasonable man's interpretation of the language, but many regard the "supreme law of the land" as a living document that can mean whatever we need it to mean on any particular day.

Did the Founders error in thinking that words scribed on parchment could secure our liberty? The Founders were many things, but naïve they were not. The Father of our Country and the Father of the Constitution had their eyes wide open. George Washington wrote, "No wall of words, that no mound of parchment can be so formed as to stand against the sweeping torrent of boundless ambition on the one side, aided by the sapping current of corrupted morals on the other." James Madison added in Federalist 48, "A mere demarcation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands."

The Founders knew that words were not enough. Our republic's survival has always relied on each generation courageously defending our heritage. The prerequisite, of course, is that each generation recognize our heritage. This used to be such a standard part of American schooling that *Constituting America* might not even have been necessary. Today my daughter can earn a political science degree from a California university without reading a single Federalist Paper. For the most part, legal immigrants know more about our national heritage than the citizens born

and raised within sight of amber waves of grain.

If words cannot constrain executive overreach, what can? Only principled application of the powers bestowed by those words. Action, not recitation. As Madison wrote in Federalist 51, “The great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.”

What assigned powers are available to “counteract” executive overreach?

The legislative branch’s checks on the executive include the power of the purse; impeachment power; authority to declare war; a veto override provision; approval of appointment to fill a vice presidential vacancy; a required presidential State of the Union address to Congress; and Senate approval of appointments, treaties, and ambassadors. Although not quite as obvious of a check, Congress can also refuse to pass a bill the president wants passed. This is relevant today because President Obama believes Congressional inaction somehow transfers legislative authority to him.

The judicial check on the executive is judicial review. The chief justice also sits as president of the Senate during presidential impeachment.

The Founders did not restrict the checks to the three Federal branches: They also intended the states to be a potent check on the national government. The Constitution once included five provisions for this purpose: Enumerated powers (later reconfirmed by the Tenth amendment); equal state representation in the Senate; senators elected by state legislatures; limited national taxing authority; and an Electoral College to select the president. Unfortunately, few in Washington consider the enumerated powers a constraint; senators are now popularly elected; the Sixteenth Amendment allows Congress to collect taxes on *incomes, from whatever source derived*; and the Electoral College is under attack. These provisions have severely weakened the states as a check on a growing national government, so the states have turned to lawsuits as their primary weapon.

Few people see a problem with executive orders that make or alter laws as long as the justification is wrapped in virtuous motives. Good intentions, however, do not make sound government. Even a benevolent authoritarian regime can morph into something quite nasty. It has happened time and again throughout history. It’s past time to correct the trim and steer the ship of state back onto a constitutional course.

Which powers should Congress and the courts use? The sagacious Madison again provides the answer. “The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack.”

James D. Best, author of [Tempest at Dawn](#), a novel about the 1787 Constitutional Convention, [Principled Action](#), and the [Steve Dancy Tales](#).

President Obama's Drone Policy Could Benefit From General Washington's Wisdom – Guest Essayist: Logan Beirne

Are drones coming home to roost? Last week (essay originally published May 30, 2013), President Obama announced his administration's counterterrorism policy. The question is, will this policy defend our liberties — or destroy them?

If we adhere to our founding principles, we would use drones to fiercely defend our nation from external threats while still protecting our own citizens from their use at home. We would spend less time restricting drone use against foreign enemies, as the president did last week, and more time defining safeguards owed Americans. Instead of clearly defining the distinction between external threats versus citizens, the president concluded the “threshold that we have set for taking lethal action applies to all potential terrorist targets, regardless of whether or not they are American citizens.”

The president has already used drones to kill four Americans overseas, and appears poised to extend their use to the homeland, with his administration already having ordered the Federal Aviation Administration to expedite the process of integrating drones into civilian airspace. We must ask ourselves how far the president's commander in chief authority extends.

When our founding generation set out the new presidency's military power in the Constitution, they used amazingly few words: “The President shall be Commander in Chief of the Army and Navy.” They were not being cagey. On the contrary, they needed no further description because the term “Commander in Chief” made perfect sense to the patriots of the Revolution — it meant the same powers that Commander in Chief George Washington had exercised to protect them. Accordingly, the Supreme Court often looks to this kind of history in determining the meaning of the Constitution today.

Washington was prepared to crush foreign threats with the full might of the American arsenal. While he obviously lacked modern technology, killing from afar is not a new phenomenon. Washington had sharpshooters and artillery with which he could eliminate enemy targets and a network of spies with which he could target individuals. The fundamental issue is not really about how we kill, but whom.

To Washington, it was the commander in chief's prerogative to take out foreign targets as he saw fit. He had no qualms about shelling the British in Boston or approving a plan to kidnap a son of King George III because, to him, it was the commander's role to vigorously defend Americans from external threats. These precedents support the power of the president to employ drones vigorously against foreign enemies, but when it comes to citizens, our founding principles paint a very different picture.

During the Revolution, 15 to 20 percent of Americans supported the British. John Adams colorfully described these Loyalists as “spiders, toads [and] snakes.” At the same time, trampling the rights of even such a “despicable animal” violated the Americans' commitment to republican principles.

Some Loyalists actively took up arms against their nation. These men were shot on the battlefield. Whether in Canada or New Jersey, Washington had no reservations about protecting his people from imminent attack. Other Loyalists, however, were merely suspected of treasonous acts, speaking out against the Revolution, or even serious assassination plots. This distinction between the imminent violent threat and the less imminent lawbreaker was crucial. Washington gunned down the former but protected the rights of the latter.

Perhaps the Loyalist lawbreakers also deserved death, but what was important to Washington was that it was up to the courts to decide that rather than the military. Alexander Hamilton wrote of Washington, “His Excellency desires to avoid nothing more, than the least Encroachment upon the rights of the Citizens.”

Take, for example, the Colonial mayor of New York City’s purported attempt to poison Washington’s dinner peas. Uncovering the plot, Washington broke into Mayor David Mathews’ house in the middle of the night. Many expected their general to shoot the perpetrator on the spot. He did not. Washington, ever conscientious of proper procedure, simply arrested him. He left the fates of civilians largely to the discretion of the civil authorities — even if those authorities were not particularly capable. As the wily Mathews awaited trial, he bribed his guards and escaped to British-occupied territory.

Technology will continue to change, but our values and our precedents should not. Washington had the means to mount a targeted surprise attack from a distance, like we do now with drones. However, Washington never ordered his sharpshooters to pick off Mathews nor did he use his spies to assassinate him in the night. Washington refused to adopt a policy of summarily executing Americans. Based on his understanding of the laws of war and his role as the American commander in chief, that would have been a violation of American values.

President Obama declared, “I do not believe it would be constitutional for the government to target and kill any U.S. citizen — with a drone or a shotgun — without due process.” He failed to define what process is due and when. Is it acceptable to suspend due process in the case of an imminent threat? Did Anwar al-Awlaki require the immediacy of a charging Loyalist (whom Washington would have gunned down), or was he involved in a plot more akin to that of Mathews? Whose role is it to decide? The president’s speech left these questions open.

While it is most certainly within the president’s power to muscularly defend the nation from all foreign threats, he must make sure we are protecting America’s founding constitutional principles at the same time. Although targeting foreign terrorists is something our Founders would applaud, killing U.S. citizens suspected of crimes is setting us on a slippery slope. What are the limits on our growing government’s power over Americans?

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Logan Beirne is an Olin Scholar at Yale Law School and the author of “Blood of Tyrants: George Washington and the Forging of the Presidency” (Encounter Books, 2013).

What James Madison Teaches Us About NSA Surveillance – Guest Essayist: Logan Beirne

A federal district judge ruled on Monday (essay originally published December 18, 2013) that the National Security Agency program tracking all Americans' phone calls is "probably unconstitutional." In *Klayman v. Obama*, Judge Richard J. Leon of the U.S. District Court for the District of Columbia held that "such a program infringes on 'the degree of privacy' that the Founders enshrined in the Fourth Amendment."

Appealing to the nation's founding ideals, he continues, "the author of our Constitution, James Madison, who cautioned us to beware 'the abridgement of freedom of the people by gradual and silent encroachments by those in power,' would be aghast."

While Judge Leon spends mere sentences on this history, it is a crucial point that directly impacts pending cases challenging NSA surveillance programs.

"Perhaps it is a universal truth," James Madison wrote Thomas Jefferson in 1798, "that loss of liberty at home is to be charged against provisions against danger, real or pretended, from abroad." With revelations about the NSA not only capturing American citizens' communications but also sharing them abroad, we should stop and ask ourselves whether we are proving Madison correct.

The manner in which our nation confronts the very real dangers we face will determine Americans' future liberties — or lack thereof. As the nation strives to balance our liberty versus our safety, we might consider our founding principles. And those principles, to which Judge Leon astutely alludes, suggest we demand greater oversight of the NSA's domestic activities.

The Founders applauded efforts to keep a close watch on foreign nationals using all tools at our disposal; nevertheless, they would take issue with the fact that untold millions of private American citizens are swept into the dragnet as well. The patriots fought the Revolution to rid the United States of unjust government intrusion, after all.

As commander in chief during the American Revolution, George Washington was not shy about collecting intelligence, explaining that "It is by comparing a variety of information, we are frequently enabled to investigate facts, which were so intricate or hidden, that no single clue could have led to the knowledge of them."

He ferociously hunted America's enemies, using varied and ingenious methods — but he did so while guarding citizens' rights.

In what was perhaps the 18th Century version of today's NSA programs, the founders intercepted the private mail of Americans loyal to the crown. However, the patriots targeted specific individuals and guarded against abuses. Rather than secretive national government agencies, they sought to ensure transparent republican oversight over the process.

The Continental Congress ensured that local committees and their designees oversaw this mail

surveillance while attempting to maintain secrecy of the intelligence gathered.

Such transparency and widespread oversight protected against abuses and stands in stark contrast to the largely unchecked Foreign Intelligence Surveillance Court and internal NSA audits.

While we may decide as a nation that the current NSA activities are less intrusive than the searches of yesteryear, these programs are worth our scrutiny due to the precedents they set.

The FISA Court has already found that the NSA violated the Fourth Amendment while collecting data on domestic fiber-optic cables.

How many more violations have there been of which we do not yet know?

At our nation's birth, the founding generation sought to guard against secret government surveillance lacking in oversight and accountability. Times and technology will continue to change, but our values should not.

We might look to our founders for guidance on how to respond to security challenges while remaining faithful to our nation's core constitutional principles.

As the James Madison warned in 1792, "Where an excess of power prevails . . . [n]o man is safe in his opinions, his person, his faculties, or his possessions."

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Logan Beirne is an Olin Scholar at Yale Law School and the author of "Blood of Tyrants: George Washington and the Forging of the Presidency" (Encounter Books, 2013).

King V. Burwell: Finding A Path Forward After An Executive Overreach – Guest Essayist: Grace Marie Turner

The Supreme Court justices had a lively discussion yesterday (essay originally published March 5, 2015) during [arguments in King v. Burwell](#) about who Congress intended to get health insurance subsidies and under what conditions.

The central question is whether the Internal Revenue Service had the authority to write a rule authorizing subsidies to go to millions of people in the 37 states now operating under federal exchanges.

The plaintiffs say the language of the law is clear: Subsidies are allowed in "an Exchange established by the State under [section] 1311 of the Patient Protection and Affordable Care Act." It doesn't just say this once, but nine times in various linguistic forms.

The government argues that it is just a typo in legislative drafting: Congress clearly wanted subsidies to be available to citizens of all of the states, and the IRS therefore had the authority to write its rule authorizing subsidies in both federal and state exchanges.

We likely will know the Court's decision in June. If the justices decide against the government, the Congress will need to quickly step forward with a legislative solution. And several options are under consideration. Most would provide subsidies as a temporary bridge so people can keep the

policies they have. But they would eliminate the unpopular and destructive mandates and regulations that drive up the cost of health insurance for millions of people and businesses.

The Issue Before The Court

The language of the “Affordable Care Act” expressly allows tax subsidies to residents of states that establish their own health insurance exchange. Some states have been relatively successful at this: Kentucky, Connecticut, New York, and California. But most states decided against setting up their own exchanges, 34 in all. Other states — Oregon, Nevada, and New Mexico — tried to set up exchanges but failed and defaulted to the federal exchange.

House Speaker John Boehner and Senate Majority Leader Mitch McConnell each have appointed high-level task forces to come up with legislative solutions should the Court strike down the IRS rule. They are committed to making sure an estimated six million people currently receiving subsidies in the federal exchange states can maintain their coverage and have better, more affordable options for health insurance going forward.

One of the key questions during oral arguments involved the principle of federalism: Was the Congress trying to encourage the states to set up their own exchanges by making health insurance subsidies for their citizens conditional?

The government argues no. It says the states always had the option of whether or not to set up an exchange and that Congress clearly intended subsidies to be available to citizens in all of the states.

But that is not what the legislative history shows. New [research shows](#) congressional committees had and discarded language explicitly authorizing tax subsidies in the federal exchanges. An analysis by an independent attorney shows that senators who were merging two committee bills in 2009 had language in front of them that would have allowed health insurance subsidies to flow through the federally established fallback exchanges. But they took out that language in the final bill that went to the floor.

This gets to the core legal issue of “congressional intent.” There are few principles of statutory construction more compelling than evidence showing Congress had the language before it to achieve a stated goal but discarded the language in the final legislation.

The bill that went to the Senate floor in December of 2009 and which ultimately was enacted was the product of a number of meetings to reconcile the Senate Health, Education, Labor, and Pensions and Finance committee bills. The HELP bill, S. 1679, explicitly tied the availability of premium credits to its federal fallback exchange, called a “Gateway.” According to the new analysis, there was “clear and explicit authorization that premium tax credits were also available through a ‘Gateway’ established by the Secretary of Health and Human Services.” But that language was subsequently not included in the final version sent to the floor by the Senate Finance committee as S. 1796. The Finance Committee version only explicitly authorized subsidies to flow through exchanges “established by the State.”

That is the point that MIT economist Jonathan Gruber made when he famously said: “If you’re a state, and you don’t set up an exchange, that means your citizens don’t get their tax credits.” Professor Gruber has since retracted the statement, but the quote captures the plaintiff’s arguments.

A *Wall Street Journal* [editorial](#) on March 2, 2015 also said:

As the Mountain States Legal Foundation and other amici briefs point out, previous versions of the Affordable Care Act extended subsidies to the federal exchanges too. But that language was deleted in the secret negotiations to combine various Senate bills. After [Scott Brown](#)’s

Massachusetts special election ended the Democratic supermajority, Democrats accepted and President Obama signed the final Senate bill as the last helicopter out of Saigon.

The President cannot now unilaterally revise those details because they are politically inconvenient. Blessing this lawless behavior sets a dangerous precedent, handing the bureaucracy a license to reshape statutes without the consent of Congress. *King* is an opportunity for the Court to rebuke this growing merger of legislative and executive power.

Coercion Versus Illegality?

But Justice Anthony Kennedy said he thinks there may be a larger constitutional question in play. He expressed concern that if the federal government really intended only to give subsidies to states that built their own exchanges, it could be an “unconstitutional form of federal coercion.” Justice Kennedy “expressed deep concern with a system where the statute would potentially destroy the insurance system in states that chose not to establish their own exchanges,” according to [SCOTUSBlog](#). Because the subsidies are so integral to making the exchanges work, the government essentially would be forcing states to build them, Kennedy asserted.

Under this view, if the Court were to rule in favor of the petitioners and uphold the law as written, it would in effect be endorsing the federal government’s unconstitutional coercion of the states. But as noted above, if the Court were to side with the government, it would be endorsing illegal activity by an administrative agency. And it is not clear that the destruction envisioned from the absence of a state exchange would result: The United States managed for nearly a century to have health insurance markets operating without the help of federal exchanges.

An estimated nine million people currently have health insurance through federal exchanges, one tenth the number of people in the country with private health insurance. Given more freedom to work with health insurance companies to offer more flexible, affordable policies, the system could relatively quickly return to equilibrium. Subsidies would be needed, especially for those with expensive medical conditions, but a new health insurance market would emerge for those currently in the exchanges – many of whom had their policies cancelled because they didn’t comply with ACA rules and mandates.

And Congress says it is ready to take legislative action: Sens. Orrin Hatch (UT), Lamar Alexander (TN), and John Barrasso (WY) penned an [op-ed](#) for *The Washington Post* on Monday in which they described their “plan to protect Americans harmed by the administration’s actions” and also to give “states the freedom and flexibility to create better, more competitive health insurance markets offering more options and different choices.”

The chairmen of the three committees with jurisdiction over the issue in the House – Reps. Paul Ryan (WI), Fred Upton (MI), and John Kline (MN) – [wrote](#) about their reform plans in *The Wall Street Journal* on Tuesday. “What we will propose is an off-ramp out of ObamaCare toward patient-centered health care,” they wrote. “It has two parts: First, make insurance more affordable by ending Washington mandates and giving choice back to states, individuals and families. And second, support Americans in purchasing the coverage of their choosing.”

Congress’ first job would be to provide continuity of coverage for an estimated six million people. “It would be unfair to allow families to lose their coverage,” the senators wrote. “We would provide financial assistance to help Americans keep the coverage they picked for a transitional period.” The House chairmen offer more detail about their plans for longer-term reform involving advanceable, refundable tax credits, and say they are open to further consideration of alternative approaches.

Tom Miller of the American Enterprise Institute [explained](#) that, even if millions would lose subsidies and be unable to afford the full price of exchange coverage if the Court were to rule against the government, millions more would be protected from the individual and employer mandates in those states, avoiding financial penalties and the significant economic disruption the subsidies have created:

If the Supreme Court agrees that the statute's language limits those subsidies only to "an Exchange established by the State under [section] 1311" of the ACA, the federal tax credits will no longer be available in as many as 37 states that have failed to establish exchanges on their own for this year. Without exchange-based tax credits, the ACA's employer mandate penalties in those states would no longer apply and the mandate could no longer be enforced. A much larger share of the residents of those states also would become exempt from the law's individual mandate to purchase ACA-qualified coverage. For related reasons, a good portion of the ACA's other federally required insurance rules would be weakened, if not fully negated. ...

First, markets soon would begin to adjust and adapt. Other sources of off-exchange coverage would develop that no longer needed to comply with many ACA rules (for example, catastrophic coverage, pre-ACA grandfathered plans, re-priced insurance premiums, or reconfigured benefits packages).

Second, some automatic time lags after the Court's ruling would delay immediate effects.

States would have the option of setting up their own exchanges or accepting an offer from Congress that would provide continuity of coverage for their citizens without the enormously cumbersome superstructure of the ACA. Miller argued that there will not be a "death spiral," a term used during the oral arguments. "Officeholders in Congress and the states simply cannot and will not allow it to happen," he wrote. We trust the political process to solve the problem.

The Galen Brief

The Galen Institute submitted an [amicus brief](#) in *King*. We argue that the IRS usurped its authority and overturned longstanding norms of federalism in ruling that health insurance subsidies could be available through federally created exchanges. Citing a significant number of previous decisions, the brief argues that Congress is expected to "speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" Instead, the IRS illegally made "major policy decisions properly made by Congress" in ruling in May of 2012 that health insurance subsidies could be available to those who enroll through federally-created exchanges.

Twenty-one state legislators joined the brief "based on their interest in opposing efforts by the federal government's Executive Branch to impose policies in violation of the Affordable Care Act's unambiguous text, under the overarching limits imposed by the Constitution." All were in office when their states were deciding whether to create state health insurance exchanges. Their states have federally operated exchanges. The brief argues that "the notion that the *Federal* Government may establish and operate *astate* agency '*on behalf of the state*' is itself foreign to the concept of dual sovereignty."

Regulation of health insurance has traditionally been a responsibility of the states, and the Affordable Care Act contained a number of provisions that reinforced that authority, including a choice of whether or not to establish an exchange. If a state did so, its citizens would receive subsidies, but its insurance markets would be subject to much greater federal control. The trade-off

is that if the state did not establish an exchange, citizens and businesses in the state would be protected from most of the ACA's mandates and financial penalties.

"The IRS Rule eliminated the statutory choice by imposing those tax burdens in *all* States – even those that declined to establish their own Exchanges. The result is a more expansive exertion of federal regulatory control over health insurance than the statute authorized," the brief states. It cites previous case law that says, "If Congress intends to alter the 'usual constitutional balance between the States and the Federal Government, it must make its intention to do so 'unmistakably clear in the language of the statute.'"

Congress did not do that, making a strong argument that the Supreme Court should decide that the IRS Rule is illegal.

Grace-Marie Turner is president of the Galen Institute, a public policy research organization that she founded in 1995 to promote an informed debate over free-market ideas for health reform.

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<http://healthaffairs.org/blog/2015/03/05/king-v-burwell-finding-a-path-forward-after-an-executive-overreach/>

Editor's note: Watch Health Affairs Blog for more posts on King v. Burwell and the Supreme Court [oral arguments](#) in the case by [Tim Jost](#), [Sara Rosenbaum](#), [Bill Sage](#), [Ilya Shapiro](#), and others.

Congress' Communication Breakdown – Guest Essayist: Scot Faulkner

The world where House and Senate Chambers are packed with Members attentively listening to their colleagues ended long before films like "Mr. Smith Goes to Washington" and "Advise and Consent" paid it homage.

The Legislative Branch was intended to be the shining ideal of ordered debate and civil discourse. Thomas Jefferson eloquently spoke of this noble mission, "Congress is the great commanding theater of this nation. It is the place where laws are made." [1]

Originally, the Chambers themselves were designed to foster the exchange of ideas and the forging of national policy through intellectual inquiry. [2]

Today both Houses of the Legislative Branch are pale reflections of these ideals. Members of the House of Representatives and Senate trade prepackaged partisan barbs to empty chambers. "Congress is changing as an institution, and what you see is more and more members gearing their speeches as sound bites or YouTube clips," said Lee Drutman, a senior fellow at the

nonpartisan Sunlight Foundation. [3]

What happened to the institution where, “members quoted Shakespeare on the floor and really engaged in debate and talked to each other and tried to reason back and forth?” [4]

Blame the size and complexity of the Federal Government.

The conflict between legislative business occurring at center stage versus behind the scenes started in the Continental Congress. Even during the formative stages of America, there were committees that met away from the Chamber to prepare legislation for consideration.

These committees were temporary in nature. Ad hoc committees were established within the House and Senate for a particular purpose and ended when they completed their task. Selecting committee membership was a function of the entire body. Committee members were usually the sponsors of specific bills and resolutions. These temporary committees were formed with one week deadlines for reporting back to the parent chamber. Members of the House and Senate actually spent the majority of their time collectively in the “committee of the whole” to conduct legislative business. [5]

The first permanent, or “standing committee”, was the House’s Committee on Ways and Means in 1801. It took until 1816 before the Senate created its first standing committees. Even with standing committees, committee chairs and members acted as limited adjuncts to the full House and Senate. [6]

The rise of Andrew Jackson and “Jacksonian Democrats” ushered in modern political parties. Partisan alignments seeped into the workings of the Legislative Branch. By 1846 Members began to sit together in the Senate chamber according to party affiliation. That same year saw the shift to committee assignments based upon recommendations of political party caucuses. [7]

Even with the rise of partisanship and standing committees, legislation was primarily handled by Members conducting learned debate in Chambers packed with colleagues and the public. Congressional debates mattered and the future of America was being discussed and shaped every day the House and Senate were in session. The leaders of Washington society eagerly attended these sessions. The public filled the Senate’s “Ladies’ Gallery” and even sat on couches along the walls of the Senate Floor. [8]

America was growing and the strategic issue of slavery expanding westward dominated legislative debate. The issues were large and larger than life political leaders rose to voice concerns on behalf of the various regions of the United States.

The years 1810 through 1859, were a period known as the “Golden Age” of the Senate. During this time three of the greatest senators and orators in American history served there: Henry Clay (Kentucky) articulating the views and concerns of the West, Daniel Webster (Massachusetts) representing the North, and John C. Calhoun (South Carolina) representing the South.

During these years America's political leaders debated and resolved major issues on the Floors of the House and Senate. These included the Missouri Compromise of 1820, the nullification debate of 1830 (Haynes-Webster debates), and the Compromise of 1850. "Washington's elite gathered to watch the impassioned oratory and the great compromises that took place in this Chamber." [9]

"On any given day, you'd find most of the senators at their desks in the chamber ... writing, listening, debating, laughing, sleeping, franking mail. They were all present. No doubt, this was conducive to debate and resulted in some great discussions and arguments. The crowded Chamber also provided a great show for the visitors in the gallery." [10]

There was power in oratory. The debates among Clay, Webster, Calhoun, and others mattered. These debates over America's future became touch stones of our nation's civic culture. For example, Daniel Webster's speeches were so famous, "that his reply "Liberty and Union, now and forever, one and inseparable!" to Senator Robert Hayne in a debate in 1830 was memorized by schoolboys and was on the lips of Northern soldiers as they charged forward in the Civil War." [11]

The "Golden Age" made the House and Senate Chambers center stage in the Legislative Branch and in the nation. However, other forces were at work to pull power and attention away from this national forum.

Government was growing slowly, but incessantly. By 1856 the complexities of government, and its legislation, required major committees to hire clerical staff. For another fifty years House and Senate Members made do with cramped quarters in the ever expanding Capitol Building. The House of Representatives met in its new chamber on December 16, 1857, and the Senate first met in its new chamber on January 4, 1859. [12] During this time Members attended full sessions of the House and Senate in part because there was no other place for them to work. [13]

This fundamentally changed in the 20th Century. The Russell Senate Office Building opened in 1909. The Cannon House Office Building opened in 1908. Members began to spend more time in their offices or attending committee meetings. The role of the House and Senate Chambers diminished to a place for voting instead of debating. Eventually, six office buildings would be filled with Members and their staffs.

Another blow to the stature of Chamber debate was the surge in executive branch activism under the Progressives (Roosevelt, Taft, Wilson), Democrats (Roosevelt, Truman, Kennedy, Johnson), and ultimately Presidents of both parties.

Big government forever changed the role of the Legislative Branch. Members had to confront more than legislation. Their offices became "mini-embassies" representing and advising their constituents on navigating the ever-growing morass of government programs and agencies.

Members soon realized that power resided in minutiae rather than big issues. By specializing in niche issues and becoming experts on micro-matters they became brokers for legislative processes. Unblocking choke points meant cutting deals with their colleagues and special

interests. Members helping district and special interests to navigate the increasingly complex government labyrinth were rewarded with votes and donations. The road to power and riches ceased to be in front of the scenes, and settled into the dark recesses behind the scenes.

Efforts were made to reverse this undemocratic trend. In 1946, Congress tried to winnow down and streamline the hundreds of committees that blossomed during the New Deal and World War II. [14] Instead, The Legislative Reorganization Act of 1946 expanded staffs and institutionalized Member focus away from Floor debate. [15]

The number of committee meetings grew as government grew. During the 85th Congress (1957-1958) there were 3,750 House meetings and 2,748 Senate meetings. By the 95th Congress (1977-1978) it was 7,896 House meetings and 3,960 Senate meetings. [16] Members had to pick and choose which meetings to attend, trading time for their staff, constituents, lobbyists, and donors. Hearing rooms became just as empty as their parent Chamber.

Social media and fundraising have joined the competition for Members' over stretched attention. Lost in this cacophony is Jefferson's ideal of civil discourse. The towering figures of the Golden Age are now just names on statues that Members pass on their way to Chambers where they quickly vote and leave.

Scot Faulkner served as the first Chief Administrative Officer of the U.S. House of Representatives.

FOOTNOTES

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What Happens When The Executive Branch Tries To Make Law: The Evolution Of The Contraceptive Mandate And The “Accommodations” That Failed To Respect Protected Conscience Rights – Guest Essayist: Steven H. Aden

One Saturday morning a month, I take my eight-year-old son and my seven-year-old daughter to the neighborhood big-box hardware store for “Kid’s Craft Day.” They get an apron to wear and an assemble-it-yourself kit with instructions for building a flower pot rack or a wooden photo frame. For an hour, they get to pound nails, glue joints, and slap paint on a project that has no risks or liability attached to it. And while they’ll hopefully have the pride that comes from a solid job at the end, as every mom and dad there knows, this time together isn’t really about the finished product, but about learning the process of carefully following directions.

The nation’s biggest craft store, Hobby Lobby, and a Mennonite cabinet maker, Conestoga Wood Specialties, recently took Congress and the Executive Branch to school in the U.S. Supreme Court on the consequences of failing to follow the instructions the Constitution lays out for making solid laws. Their separate lawsuits against the federal government wound up there so the nine Justices could decide whether the U.S. Department of Health and Human Services had “faithfully executed” (Article II, § 3) the Affordable Care Act– or if the agency had actually violated the federal Religious Freedom Restoration Act’s requirement that the beliefs of religious persons must be respected in all federal programs.

At issue in these cases were HHS regulations drafted under the Affordable Care Act of 2010, popularly known as “Obamacare.” In that act, Congress generally requires employers with 50 or

more full-time employees to offer group health insurance coverage that provides a minimum level of essential coverage. Heavy fines may be levied on an employer that fails to comply with the law's coverage requirements, including "preventive care and screenings" for women to be provided at no cost to employees.

At this point, the legislative branch, in crafting this part of Obamacare, seems to have forgotten to refer back to Article 8, § 1 of the Constitution, which grants it not only specific enumerated powers to "provide for the general welfare," but more particularly the authority to "make all laws which shall be necessary and proper for carrying into execution the[se] foregoing powers...." Congress didn't "execute" well on this provision; it failed to specify what types of preventive care must be covered, instead passing that "important and sensitive decision," as the Supreme Court characterized it in *Hobby Lobby*, into the hands of HHS' Health Resources and Services Administration. HRSA in turn lateraled the ball to the Institute of Medicine, a private nonprofit group of volunteer advisers, to determine which preventive services to require.

Unfortunately for religious employers like Hobby Lobby, a closely held family business that devout Evangelicals own and run, and the Mennonite family that owns Conestoga Wood Specialties, HRSA took the institute's recommendations and incorporated them into guidelines for women's preventive care that mandated coverage for "[a]ll Food and Drug Administration approved contraceptive methods [and] sterilization procedures," including methods these religious businesspersons believed could cause early abortions.

At this point, the audible play calling becomes hard to follow. HHS also authorized HRSA to exempt certain "religious employers" from the contraceptive mandate. HRSA didn't trust itself to get the medicine of Obamacare right, but for some reason it did feel quite competent enough to get religion right. As long as it was passing the ball around, it might have brought in the U.S. Conference of Catholic Bishops or the National Association of Evangelicals to help it decide how "religious" was religious enough for the exemption. Instead, it plowed forward and enacted a rule that departed from a consistent historical practice of granting expansive statutory religious accommodations by exempting only the narrowest possible category of employers – "churches, their integrated auxiliaries, and conventions or associations of churches," and "religious order[s]."

After considerable pushback from religious charities and schools, HHS audibled again, establishing an "accommodation" for religious nonprofits under which an organization could self-certify that it opposes providing coverage for particular contraceptive services, upon receipt of which its insurance company must exclude contraceptive coverage from coverage but provide separate payments directly to employees for contraceptive services.

What followed was a landslide of federal lawsuits perhaps unprecedented in modern legal history, all alleging that HHS' rule was trampling on the religious conscience of individuals, corporations, and organizations in violation of the Free Exercise Clause of the First Amendment and the federal Religious Freedom Restoration Act. The more than 400 litigants included Roman Catholic dioceses, Catholic and Evangelical-owned for-profit businesses, faith-based ministries representing a broad range of ecclesiastical and ecumenical viewpoints, private religious colleges, and individuals. Ultimately, the rights of many of these hundreds of claimants were represented in the Supreme Court by Hobby Lobby and Conestoga Wood Specialties.

The Supreme Court held that HHS's failure to respect the religious beliefs of for-profit employers violated RFRA. Justice Samuel Alito, writing for the majority, turned back the Obama administration's argument that it could not grant a broader exemption to religious employers because to do so would undermine its goal of providing free contraception to women. The ACA exempts "a great many employers" from its requirements, he observed, and it "grandfathered" the insurance plans of many others, allowing them to retain the same coverage they had before the ACA. "All told, the contraceptive mandate 'presently does not apply to tens of millions of people,'" the court pointed out.

Additionally, the government argument for uniformity "is not easy to square with the position taken by HHS in providing exemptions from the contraceptive mandate for religious employers, such as churches, that have the very same religious objections as [Hobby Lobby and Conestoga]. The connection between what these religious employers would be required to do if not exempted (provide insurance coverage for particular contraceptives) and the ultimate event that they find morally wrong (destruction of an embryo) is exactly the same," the majority reasoned. In the final analysis, the Supreme Court hoisted HHS up on its own "accommodation" for non-profit employers; this move, it said, "has demonstrated that [HHS] has at its disposal an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs."

Whether and to what extent the Supreme Court will also toss the non-profit "accommodation" rule as a violation of RFRA remains to be seen. The court may have already signaled its leanings on the matter by granting emergency injunctive relief from the contraceptive mandate to a charity run by nuns, Little Sisters of the Poor, and a diocese of the Catholic Church. Whatever the high court does, its *Hobby Lobby* ruling should serve as a warning to Congress and the Executive Branch to follow the blueprint the Constitution provides when drafting rules for religious accommodation.

Steven H. Aden has more than two decades of experience defending constitutionally protected freedoms. He serves as senior counsel with [Alliance Defending Freedom](#) in its Washington, D.C., office.

America On The Brink Of Losing Constitutional Form Of Government Forever – Guest Essayist: Phil Kerpen

The rule of law is in grave danger, as federal regulators use ever thinner legal pretexts to enable vast public policy changes without votes by our elected representatives. In a span of just seven days, (essay originally published on March 5, 2015) the FCC declared the Internet a public utility, Congress acceded to DHS implementing executive amnesty, the president used a veto threat to protect the NLRB's ambush elections rule, and the Supreme Court's four liberals showed they are not just willing but enthusiastic to allow the IRS to ignore the plain language of Obamacare. A great week for regulators, but a terrible week for everyone else.

The FCC order regulating the Internet was written by political operatives in the White House, is over 300 pages long and – even though it was approved on a party-line 3-to-2 vote on February

26 – has still not been released to the public. The man who reportedly convinced President Obama to demand the FCC, which is supposed to be an independent agency, to adopt his plan was Tumblr CEO David Karp, who when asked the most rudimentary question about the economics of the order replied: “Ummm, uhhhh, I confess. Not my area of expertise.” Now, the same radical pressure groups that have long pushed for such regulations, funded by \$196 million from George Soros and the Ford Foundation, are launching a major effort to scare Congress – the legitimate legislative branch of the federal government – into sitting on their hands and not acting on the issue.

The union agenda was emphatically rejected when the card check bill, a union wish list that included ending private ballot protections for organizing elections crashed and burned in Obama’s first term. Undeterred, the president stacked the NLRB with union lawyers via “recess appointments” made when the Senate was not in recess. When the Supreme Court struck down the illegal appointments in an emphatic 9-to-0 decision, Harry Reid threatened to use the nuclear option to break Senate rules to stack the board again. (Reid later went beyond threats and actually executed the nuclear option to allow Obama to stack the DC Circuit court that reviews agency actions, enabling further abuses of agency power.)

The union lawyers at the NLRB recently adopted an ambush elections rule that allows union organizers to demand surprise elections at a strategic moment of their choosing, before employees have an opportunity to consider the arguments against joining a union. The Senate voted to overturn the rule this week, but President Obama promised to use his veto to keep the rule in effect, even though it is opposed by Congress.

Worst of all, the Supreme Court appears to be seriously entertaining allowing an IRS rule that magically transfigures healthcare.gov, created by the federal secretary of Health and Human Services, into “an exchange established by the state.” That little IRS magic spends billions of taxpayer dollars on subsidies and triggers employer mandate penalties, causing jobs to be destroyed and shifts cut in states that lawfully opted out. The rule is absurd on its face. But it may be upheld, and if it is, we will officially be in an era in which agencies like the IRS can do the opposite of what the laws actually say.

This is all in just one week. (I haven’t even mentioned that the EPA remains as committed as ever to coercing states into adopting cap-and-trade energy taxes that were rejected by Congress.)

The shifting of ever more power into the presidency and his regulatory apparatus is a long running problem, but it has accelerated dramatically in the current administration. President Obama is now even reportedly exploring the possibility of usurping Congress’s most fundamental power by directly ordering tax hikes.

We are, if the American people don’t wake up and demand better, on the brink of losing our constitutional form of government forever in favor of a soft tyranny of federal regulators constrained only by elite opinion and quadrennial presidential elections.

Phil Kerpen is head of American Commitment and a leading free-market policy analyst and advocate in Washington. Kerpen was the principal policy and legislative strategist at Americans

for Prosperity for over five years. He previously worked at the Free Enterprise Fund, the Club for Growth, and the Cato Institute. Kerpen is also a nationally syndicated columnist, chairman of the Internet Freedom Coalition, and author of the 2011 book "Democracy Denied."
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The Most Effectual Weapon Against Executive Overreach: The Power Of The Purse – Guest Essayist: Senator Mike Lee

In addition to the power to enact important reforms like the REINS Act and the USA Freedom Act, Congress has another time-honored power to exercise when it needs to stop an overreaching executive. It is a power wielded far too infrequently in recent years. And it is a power that James Madison described in *Federalist 58* as “the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.”

Madison was talking about the power of the purse. Without congressional approval, no federal program can be funded, and without funding, no program can be implemented. By simply refusing to fund a president’s unconstitutional conduct, Congress can stop him dead in his tracks— even after courts have abdicated their responsibility to do so.

I was reminded of this principle on July 2, 2013. I was in my office in Salt Lake City when a member of my staff told me to turn on the news. What I saw was shocking. According to the report, President Obama had decided to delay Obamacare’s “employer mandate,” which requires many businesses to provide their employees with health insurance. Even though the legislation pushed through Congress and signed into law by President Obama himself required the employer mandate to kick in at the beginning of 2014, the president was delaying this provision’s effective date by a year.

There was absolutely no statutory authority in Obamacare permitting the president to rewrite the provision pre-scribing the starting date for the employer mandate. Nor did President Obama have any inherent constitutional authority to do so. Quite to the contrary, the Constitution’s text and structure make clear that a president lacks the authority to rewrite legislation unilaterally, *i.e.*, without any action by Congress. The first clause of the Constitution’s first article is as simple as it is clear; it provides, “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” In other words, the power to legislate— that is, the power to *make law*— belongs to Congress. When the president rewrites acts of Congress, he usurps Congress’s “legislative powers,” upsets the Constitution’s balance of power, and turns citizens into subjects by denying their directly elected representatives the exclusive authority to make the laws that govern their lives.

Congress needed to use its “most complete and effectual weapon”—its power over the federal purse.

By late September 2013, America’s political leaders had a choice to make. If October 1 arrived before Congress funded the government for the next fiscal year, countless federal programs

would run out of money. The question was: Would Congress pass a spending bill amenable to the House, the Senate, and the president before October 1, and would such a measure include funding for Obamacare?

The question was complicated by an obscure but remarkably significant change in how Congress has allocated funds in recent years. Congress has historically funded the federal government first by passing a budget and then by enacting a series of spending measures (a dozen or so), each of which appropriates money for a different government function (*e.g.*, defense or transportation). When Congress follows this time-honored process, each spending measure is independently proposed by a committee, debated on the floor, amended, voted on, and sent to the president for his signature. This process has a way of keeping spending discussions in Congress focused. For example, it helps create an environment in which decisions regarding defense-related spending will be influenced by concerns related to national defense, not national parks, and decisions regarding national parks will be influenced by concerns related to national parks, not national defense.

Had Congress simply followed its own appropriations process, it would have been far easier to have an open, honest debate regarding the merits of Obamacare.

Congress, however, has been disregarding that process since 2009. Instead of budgeting and then proposing, debating, amending, and passing a series of smaller spending bills, Congress has been keeping the government funded through a single, enormous, all-or-nothing spending package. If the giant bill becomes law, the government stays funded. If it is voted down or vetoed, some of the government shuts down.

This flagrant departure from the traditional budgeting and appropriations process has put our country on a collision course with disaster. Congress routinely spends money it doesn't have—creating trillion-dollar deficits—because senators and congressmen are afraid to vote against an all-or-nothing spending package, knowing that its defeat could result in a government shutdown. Meanwhile, meaningful oversight of the executive branch has become impossible because, without voting against funding the entire government, members of Congress can no longer say, “Hey, you're running this particular program poorly, so we're going to cut back on funding it until you get your act together!”

By late 2014, after President Obama had repeatedly usurped Congress's authority and rewritten Obamacare dozens of times, it was clear that we were not well positioned to stop his assault on the Constitution. At least for the time being, he had won, and we had lost; rule by executive fiat had won, and the separation of powers had lost; the transformation of the relationship between the government and the governed had won, and the Constitution's creation of a federated structure with enumerated and limited powers had lost.

This was, however, only a single battle. The larger war for the Constitution goes on. As long as our government remains in the hands of fallible humans, some of them will seek perpetually to expand and even abuse their power. At the same time, the Constitution will stand ready to restrain those individuals and protect our liberty— if only we are willing to fight for it.

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The Inevitability of Executive Overreach – Guest Essayist: Kyle Scott

George Washington's Proclamation of Neutrality, Thomas Jefferson's Louisiana Purchase, Abraham Lincoln's Emancipation Proclamation, invasion of the South, and suspension of *habeas corpus*, Harry S. Truman's railroad seizures, and the growth of militarism domestically and internationally by George W. Bush and Barack H. Obama are all examples of executive overreach; examples of when the President used powers not given to him by the Constitution or exercised by his predecessor. Executive overreach is neither unique to the American system nor new to our time. Efforts to limit executive control, whether it be an elected president, entrenched oligarchy, or hereditary monarchy, have defined Western political thought and reform since Magna Carta was signed by King John of England in 1215 at Runnymede. The greatest and most enduring thinkers—John Locke, Baron de Montesquieu, Jean Jacques Rousseau—that influenced the political revolutions of the 18th Century and still define the contours of our current political paradigm were concerned with restraining executive authority through the dispersion of political authority. In 1776 the U.S. declared itself independent and proceeded to rid itself of an executive and parliament that had usurped their authority. But no sooner did America win its independence did it seek to reconcentrate power into a centralized governing structure by ridding itself of the Articles of Confederation and ratifying the U.S. Constitution. The responsibility of an enlightened and engaged citizenry is to thwart all efforts of overreach.

Executive overreach in the U.S. does not follow a linear trajectory, but it did begin with George Washington and has proceeded to get worse with each successive President. Each President—with William Henry Harrison perhaps being the lone exception—has sought to expand his sphere of authority thus setting up a precedent for the next President. And once a new zone of authority is acquired it is nearly impossible to wrestle away.

Any student of history will recognize the trend and thus there is no need to do more than mention the few examples listed above. What most concerns this essay is painting in general terms how this happens and what can be done about it. The expansion of executive authority has occurred for several reasons, most of which are common to all incidences of executive overreach in the U.S. or elsewhere although the exact forms will vary from country to country. First, it is far easier for one person to take action than it is for a lot of people. Second, it is politically expedient for members of Congress and the state legislatures to not take action. Third, the most active citizens, the citizens who generally decide elections, can be self-righteous and petty. None of the three causes are isolated from one another but they will be discussed in isolation for concerns of order and clarity. The reader should make note, even if not explicitly noted by the author, how these factors are interrelated and reinforce the trend of executive overreach.

Anyone who has ever eaten a meal knows it is easier to feed oneself than it is to decide where to go with a family of four. The more people needed to decide on a course of action the more difficult it becomes to reach an agreement. The president has the capacity to act alone. Acting

alone may be unconstitutional and unethical in some circumstances but he has the capability at his disposal if he chooses. This is also why it is not surprising to see limited opposition to executive overreach by the courts or Congress. The courts are restricted in the cases they can decide in that someone must bring a case to them. Also, courts cannot take unilateral action against the President for fear the President may not carry out their ruling thus neutering the court's relevance. Moreover, there is little incentive for lower courts to decide against executive action as a judge who goes against the President is unlikely to be considered for a better appointment.

Congress finds it difficult to act against presidential overreach for two reasons. First, nearly half of all Congresspersons are usually of the President's party and therefore have some affinity for the policy the President has pursued through unilateral action. If a President decides to unilaterally suspend the deportation of illegal aliens Congress will not take actions to stop the executive order given that getting the votes to do so would be impossible. And even in instances where the members of the President's party in Congress do not agree with his policy position they recognize that direct conflict with the President, if they are of the same party, is not in their best interest personally or for the party.

This leads directly into the second category for why overreach occurs: Congress. On matters where there is not a clear dividing line between parties, where the electorate has not clearly delineated itself on an issue, on controversial matters that are unsettled in the electorate, or on unpopular issues, it is in the best interest of a member of Congress to not take action if they want to be reelected or work their way onto favorable committee assignments. There is no incentive for congressmen and women to take a stance unless it is on an issue where they clearly know where their constituency stands. Moreover, unless it is highly salient outside of their constituency, it does them no good to take a public stance outside of their district or state for the risk of marginalizing themselves within the party apparatus. And in those unique instances where it is safe for a member of Congress to do something it is much easier to say something than it is to actually do something. Getting something done would force one to use their political capital in a way that may not bring about the desired result and benefit them with their home district or state. Moreover, to write legislation, and get enough support to get it passed through both houses, that overrides an executive order would simply be vetoed by the President thus rendering the entire exercise pointless any way. Thus, the most a congressperson can do is limit the money that goes to the President's plan. But if the President can work his policy through agencies that are funded through revenue streams independent of Congress, even that won't work.

But, to reiterate the central point of why congress is ineffective at blocking executive overreach, it is politically inconvenient to do so. Congress does not stymie the President's efforts by blocking avenues he may use in administrative agencies, or any other means at its disposal, is because the next time a member of Congress loses their seat because of some obscure rule promulgated by an administrative agency will be the first time.

To keep it brief, the same dynamics that play out in Congress play out in each of the fifty state legislatures as well. State legislatures have even less incentive to fight against executive or legislative overreach that threatens state sovereignty for all the reasons listed above, albeit in different variants, plus there is a risk of losing some of the federal dollars doled out to the states.

Legislatures like federal money as it allows them to spend on programs without increasing state taxes. If states were self-funded, legislatures would have to gut their current programs or raise taxes to a level that was unsustainable. As a result, because elected officials like to keep their jobs, states usually put up futile resistance to national overreach coming from the President or Congress. The result is a collapsing (collapsed?) federal structure.

This, then, leads directly into the final category. Voters like it when politicians vote for their preferred programs and are unwilling to see cuts in the programs they think are important. Among voters there is generally no sense of self-sacrifice or compromise. Every voter feels righteous pushing for what they want with little self-awareness. Those at the top of the political apparatus like to see this sort of in-fighting among voters for it distracts from what is going on at the top. If voters fight amongst themselves then their elected representatives have no need to take bold action which then allows the President to do whatever he wants. Executive overreach is allowed to occur through a classic divide-and-conquer strategy. Until voters can be rational and well-informed, and be willing to work with people on a single issue with whom they disagree on others, presidential overreach will persist. Voters are unlikely to unite around the cause of executive overreach for one of the reasons Congress will not: they like it when their President is in power and dislike it when the President from the other party does it. When a voter looks at congressional gridlock, then sees the President she voted for do something without Congress, even if its overreach, that voter will excuse the President's indiscretion as she feels the greater good has been served. Voters in both parties are guilty of this and executive overreach will continue until it becomes a unifying issue that both sides oppose regardless of which party occupies the White House. When this occurs the President will feel constrained and Congress will be compelled to act. And that's the only hope.

There is an unaddressed requirement within our Constitution: Citizens will pay attention and make rational decisions. The Framers recognized that the general population could not be relied upon for good government which is why they established a federal republic rather than a national democracy. The problem becomes that without a public with a cultivated sense of justice and the common good than what we currently have, those who are elected as representatives diminish in quality as well. Those who are supposed to safeguard the structure are not of the quality that can be entrusted with such a task. Until school board meetings have higher attendance rates than high school football games, until more people go to church than watch football on Sundays, or book sales outpace beer sales, until the Kardashian's popularity plummets and engagement at townhall meetings skyrockets, and until we can move past our own self-righteous indignation of those who oppose us and recognize that the nation's salvation rests in the cultivation of good sense and goodwill among the populace, and not in a popularly elected official; executive overreach will continue until any semblance of a republic is lost. It is not important that we recognize what is lacking in others and tell them how to improve, it is important that we recognize in ourselves what is lacking and take action to improve.

Kyle Scott, PhD, has contributed to each of the "90 Days" series for Constituting America. His writing has appeared in academic and popular outlets. His fifth book, The Story of Politics, is due out this summer. Kyle teaches political science at the University of Houston and serves on the Board of Trustees for the Lone Star College System. You may find out more about him at www.kyleascott.com or contact him on Twitter @scottkylea or kyle.a.scott@hotmail.com.

Operation Choke Point: Agencies Getting Around The Constitution's Protections – Guest Essayist: Andrew Langer

“The Constitution protects us from our own best intentions. It divides power among sovereigns and among branches of government precisely, so that we might resist the temptation to concentrate power in one branch as the expedient solution to the crisis of the day.”

With those words more than two decades ago, Justice Sandra Day O'Connor eloquently gave a singularly accurate description of the very essence of our republic. Our greatest strength lies not in our universal enfranchisement, but in the constraint that we as a people place on our government. “Federalism,” she went on, “secures to individuals the liberties that derive from the *diffusion of sovereign power*!” [emphasis added]

As the founders predicted, and as we have continued to debate vigorously throughout the nation's history, the trend for our federal government is to grow its own power, and to see that power concentrated by the federal executive branch. We try to diffuse it, and put checks on it, but there is nevertheless this impulse by Presidents (and their cronies) to grab more—and there is no greater example today than an effort called “*Operation Choke Point*”.

Normally, regulatory power operates in a manner that is both straightforward and complex. A system of processes known as the “Administrative Procedures Act” (APA) governs how the laws passed by Congress are interpreted by Executive Branch agencies, creating the body of rules known as the federal regulatory state. And because federal regulations can impact people in all walks of life, the APA exists as an additional check on power—to ensure that the rights of the individuals subject to rules and regulations are protected.

At its core is the concept of public participation and transparency—individuals (especially those subject to regulations) can comment on regulatory proposals, and make their case as to why a certain proposal should or should not be adopted, and what changes ought to be made. In fact, the APA mandates that agencies must address substantive comments in their “final rule”—showing what changes were made, given recommendations, or why a recommendation was not addressed. Failure to follow these rules creates an avenue for an agency's decision to be challenged in court, and overturned.

But *Operation Choke Point* (OCP) does an end run around all that. It is a way for agencies to shut down individual businesses or entire industries, even when they have no legislative mandate to do so, and without going through the normal APA “notice and comment” rulemaking process.

A joint operation by the US Department of Justice, Treasury, the FDIC and the Consumer Financial Protection Bureau, OCP's stated goal is to combat fraudulent financial transactions in industries the Administration claims have a high rate of fraudulent behavior. But when one reads the OCP target list, as created and released by the FDIC, one sees a political agenda at work—guns and ammunition manufacturers and dealers, payday lenders, even adult entertainers, all are on the list.

How OCP shuts down these businesses is deviously simple: federal regulators show up at banks

and credit card payment processors, and under threat of regulatory investigation and action, “encourage” these institutions to shut down bank accounts and stop processing credit card payments for these businesses. Unable to bank or maintain cash flow, these businesses wither away and die—literally “choked off” from their cash, as the name of the operation suggests (and to be clear, ***“Operation Choke Point”*** is the name given to the operation by the federal regulators *themselves!*).

But because there is never an “order,” the agencies behind OCP have complete deniability—and, in fact, until public and congressional pressure was brought to bear on the project, they categorically denied that OCP was responsible for the numerous closures of bank and credit card processing accounts.

The pernicious nature of OCP is clear—whereas before OCP, if an agency wanted to shut down a business (or an entire industry), it would have to point to some precept in statute, figure out where the business had violated the law (or regulation), go through an investigation, possibly actually have to engage with the business so that the business could take steps to correct the defect or defend themselves... jump through a series of legal hoops that serve to protect the public’s interest. In many cases, the Constitution itself may expressly prohibit the federal government from wholesale interference in an industry (like the Second Amendment’s limitations on government’s power to interfere with the right to keep and bear arms).

So while the Second Amendment may protect gun rights, and while there are no federal laws categorically prohibiting either the sale or manufacture of firearms, OCP gives an anti-gun administration a procedure for destroying the entire industry. Without any need for passing laws, or having a public debate over the relative merits or wisdom, all an anti-gun administration need do is put pressure on a firearm or ammunition manufacturer or dealer’s bank or credit card payment processor, and then let that business simply die off!

Following a report by the Government Reform and Oversight Committee of the US House of Representatives that was highly critical of OCP, the various agencies involved in OCP declared that they were sharply curtailing it project’s operations. But this does not mean that OCP is over—far from it. All indications are that OCP is still alive and well at the CFPB, an agency notorious for its lack of accountability and for being used as a political cudgel by the administration for dealing with its enemies.

If allowed to stand, OCP represents a horrific vision of the future of governance—all an administration need do is declare the business of some group to be tantamount to committing fraud, and it gives them the pretext for having that business shut down. OCP has already targeted small charitable organizations, and it is not a great leap to imagine that a future progressive administration might declare skepticism to man’s role in climate change to be engaging in fraudulent behavior. This would open up organizations that do a host of free-market and limited-government advocacy to having their bank accounts shut down, their credit card payment processing stopped, circumventing the protections of the First Amendment and effectively killing them.

The Constitution protects us from our own best intentions. It is fairly clear that those who want

to circumvent those protections, like those who created and manage Operation Choke Point, have intentions that are the furthest thing from “best”.

Andrew Langer is President of the [Institute for Liberty](http://www.instituteforliberty.org), and host of the LangerCast, which can be found at [RELMNetwork.com](http://www.relmnetwork.com) (<http://www.relmnetwork.com/#!/langerpopp/cdo6>)

Guess How Many Changes President Obama Has Unilaterally Made To The Affordable Care Act? A Running List! – Guest Essayists: Tyler Hartsfield And Grace-Marie Turner

By our count at the Galen Institute, more than 49 significant changes already have been made to the Patient Protection and Affordable Care Act: at least 30 that President Obama has made unilaterally, 17 that Congress has passed and the president has signed, and 2 by the Supreme Court.

CHANGES BY ADMINISTRATIVE ACTION:

1. *Medicare Advantage patch*: The administration ordered an advance draw on funds from a Medicare bonus program in order to provide extra payments to Medicare Advantage plans, in an effort to temporarily forestall cuts in benefits and therefore delay early exodus of MA plans from the program. (April 19, 2011)
2. *Employee reporting*: The administration, contrary to the Obamacare legislation, instituted a one-year delay of the requirement that employers must report to their employees on their W-2 forms the full cost of their employer-provided health insurance. (January 1, 2012)
3. *Subsidies may flow through federal exchanges*: The IRS issued a rule that allows premium assistance tax credits to be available in federal exchanges although the law specified that they only would be available through an “Exchange established by the State.” (May 23, 2012)
4. *Closing the high-risk pool*: The administration decided to prematurely halt enrollment in transitional federal high-risk pools created by the law, blocking coverage for an estimated 40,000 new applicants, citing a lack of funds. The administration had money from a fund under Secretary Sebelius’s control to extend the pools, but instead used the money to pay for advertising for Obamacare enrollment and other purposes. (February 15, 2013)
5. *Doubling allowed deductibles*: Because some group health plans use more than one benefits administrator, plans are allowed to apply separate patient cost-sharing limits to different services, such as doctor/hospital and prescription drugs, allowing maximum out-of-pocket costs to be twice as high as the law intended. (February 20, 2013)
6. *Small businesses on hold*: The administration has said that the federal exchanges for small businesses will not be ready by the 2014 statutory deadline, and instead delayed until 2015 the provision of SHOP (Small-Employer Health Option Program) that requires the exchanges to offer a choice of qualified health plans. (March 11, 2013)

7. *Delaying a low-income plan*: The administration delayed implementation of the Basic Health Program until 2015. It would have provided more-affordable health coverage for certain low-income individuals not eligible for Medicaid. (March 22, 2013)

8. *Employer-mandate delay*: By an administrative action that's contrary to statutory language in the ACA, the reporting requirements for employers were delayed by one year. (July 2, 2013)

9. *Self-attestation*: Because of the difficulty of verifying income after the employer-reporting requirement was delayed, the administration decided it would allow "self-attestation" of income by applicants for health insurance in the exchanges. This was later partially retracted after congressional and public outcry over the likelihood of fraud. (July 15, 2013)

10. *Delaying the online SHOP exchange*: The administration first delayed for a month and later for a year until November 2014 the launch of the online insurance marketplace for small businesses. The exchange was originally scheduled to launch on October 1, 2013. (September 26, 2013) (November 27, 2013)

11. *Congressional opt-out*: The administration decided to offer employer contributions to members of Congress and their staffs when they purchase insurance on the exchanges created by the ACA, a subsidy the law doesn't provide. (September 30, 2013)

12. *Delaying the individual mandate*: The administration changed the deadline for the individual mandate, by declaring that customers who have purchased insurance by March 31, 2014 will avoid the tax penalty. Previously, they would have had to purchase a plan by mid-February. (October 23, 2013)

13. *Insurance companies may offer canceled plans*: The administration announced that insurance companies may reoffer plans that previous regulations forced them to cancel. (November 14, 2013)

14. *Exempting unions from reinsurance fee*: The administration gave unions an exemption from the reinsurance fee (one of ObamaCare's many new taxes). To make up for this exemption, non-exempt plans will have to pay a higher fee, which will likely be passed onto consumers in the form of higher premiums and deductibles. (December 2, 2013)

15. *Extending Preexisting Condition Insurance Plan*: The administration extended the federal high risk pool until January 31, 2014 and again until March 15, 2014 to prevent a coverage gap for the most vulnerable. The plans were scheduled to expire on December 31, but were extended because it has been impossible for some to sign up for new coverage on healthcare.gov. (December 12, 2013) (January 14, 2014)

16. *Expanding hardship waiver to those with canceled plans*: The administration expanded the hardship waiver, which excludes people from the individual mandate and allows some to purchase catastrophic health insurance, to people who have had their plans canceled because of ObamaCare regulations. The administration later extended this waiver until October 1, 2016.

(December 19, 2013) (March 5, 2014)

17. *Bay State bailout*: More than 300,000 people in Massachusetts gained temporary Medicaid coverage in 2014 without verification of eligibility, with the Obama and Patrick administrations using a taxpayer-funded bailout to mask the failure of the commonwealth's disastrously malfunctioning

18. *Equal employer coverage delayed*: Tax officials will not be enforcing in 2014 the mandate requiring employers to offer equal coverage to all their employees. This provision of the law was supposed to go into effect in 2010, but IRS officials have "yet to issue regulations for employers to follow." (January 18, 2013)

19. *Employer-mandate delayed again*: The administration delayed for an additional year provisions of the employer mandate, postponing enforcement of the requirement for medium-size employers until 2016 and relaxing some requirements for larger employers. Businesses with 100 or more employees must offer coverage to 70% of their full-time employees in 2015 and 95% in 2016 and beyond. (February 10, 2014)

20. *Extending subsidies to non-exchange plans*: The administration released a bulletin through CMS extending subsidies to individuals who purchased health insurance plans outside of the federal or state exchanges. The bulletin also requires retroactive coverage and subsidies for individuals from the date they applied on the marketplace rather than the date they actually enrolled in a plan. (February 27, 2014)

21. *Non-compliant health plans get two year extension*: The administration pushed back the deadline by two years that requires health insurers to cancel plans that are not compliant with ObamaCare's mandates. These "illegal" plans may now be offered until 2017. This extension will prevent a wave cancellation notices from going out before the 2014 midterm elections. (March 5, 2014)

22. *Reducing cost sharing reductions*. The ACA originally called for out-of-pocket maximums to be lowered for enrollees with incomes between 100-400% FPL (Sec. 1402), but the provision proved unworkable for those 250-400% of FPL in combination with prescribed actuarial value requirements and was changed through regulation to apply to only those 100-250% of poverty. (March 11, 2014)

23. *Delaying the sign-up deadline*: The administration delayed until mid-April the March 31 deadline to sign up for insurance. Applicants simply need to check a box on their application to qualify for this extended sign-up period. (March 26, 2014)

24. *Canceling Medicare Advantage cuts*: The administration canceled scheduled cuts to Medicare Advantage. The ACA calls for \$200 billion in cuts to Medicare Advantage over 10 years. (April 7, 2014)

25. *More Funds for Insurer Bailout*: The administration said it will supplement risk corridor payments to health insurance plans with "other sources of funding" if the higher risk profile of enrollees means the plans would lose money. (May 16, 2014)

26. *Exempting U.S. territories:* Despite earlier administration claims that “HHS is not authorized to choose which provisions [of the ACA] might apply to the territories,” HHS waived six major requirements – such as guaranteed issue, community rating, and essential benefit mandates – that were causing serious disruption to health insurance markets covering 4.5 million residents of U.S. territories. (July 18, 2014)

27. *Failure to enforce abortion restrictions.* A GAO report found that many exchange insurance plans don’t separate charges for abortion services as required by the ACA, showing that the administration is not enforcing the law. In 2014, abortions were being financed with taxpayer funds in more than 1,000 exchange plans. (Sept. 16, 2014)

28. *Risk Corridor coverage:* The Obama administration plans to illegally distribute risk corridor payments to insurers, despite studies by both the Congressional Research Service and the GAO saying a congressional appropriation is required before federal agencies can make the payments. (Sept. 30, 2014)

29. *Transparency of coverage:* CMS delays statutory requirements on insurance companies to disclose data on the number of people enrolled, disenrollment, number of claims denied, costs to consumers of certain services, etc. (Oct. 20, 2014)

30. *Tax penalty pass:* Approximately 50,000 taxpayers filed income tax returns based upon inaccurate subsidy data they received from the federal government. The administration declared that if they received too large of a subsidy, they will not have to repay the government. The ACA requires, in Sec. 5000A, that “Any penalty imposed...shall be included with a taxpayer’s return...” (February 24, 2015)

CHANGES BY CONGRESS, SIGNED BY PRESIDENT OBAMA:

31. *Military benefits:* Congress clarified that plans provided by TRICARE, the military’s health-insurance program, constitutes minimal essential health-care coverage as required by the ACA; its benefits and plans wouldn’t normally meet ACA requirements. (April 26, 2010)

32. *VA benefits:* Congress also clarified that health care provided by the Department of Veterans Affairs constitutes minimum essential health-care coverage as required by the ACA. (May 27, 2010)

33. *Drug-price clarification:* Congress modified the definition of average manufacturer price (AMP) to include inhalation, infusion, implanted, or injectable drugs that are not generally dispensed through a retail pharmacy. (August 10, 2010)

34. *Doc-fix tax:* Congress modified the amount of premium tax credits that individuals would have to repay if they are over-allotted, an action designed to help offset the costs of the postponement of cuts in Medicare physician payments called for in the ACA. (December 15, 2010)

35. *Extending the adoption credit*: Congress extended the nonrefundable adoption tax credit, which happened to be included in the ACA, through tax year 2012. (December 17, 2010)

36. *TRICARE for adult children*: Congress extended TRICARE coverage to dependent adult children up to age 26 when it had previously only covered those up to the age of 21 — though beneficiaries still have to pay premiums for them. (January 7, 2011)

37. *1099 repealed*: Congress repealed the paperwork (“1099”) mandate that would have required businesses to report to the IRS all of their transactions with vendors totaling \$600 or more in a year. (April 14, 2011)

38. *No free-choice vouchers*: Congress repealed a program, supported by Senator Ron Wyden (D., Ore.) that would have allowed “free-choice vouchers,” that the *Hill* warned “could lead young, healthy workers to opt out” of their employer plans, “driving up costs for everybody else.” The same law barred additional funds for the IRS to hire new agents to enforce the health-care law. (April 15, 2011)

39. *No Medicaid for well-to-do seniors*: Congress saved taxpayers \$13 billion by changing how the eligibility for certain programs is calculated under Obamacare. Without the change, a couple earning as much as \$64,000 would still have been able to qualify for Medicaid. (November 21, 2011)

40. *CO-OPs, IPAB, IRS defunded*: Congress made further cuts to agencies implementing Obamacare. It trimmed another \$400 million off the CO-OP program, cut another \$305 million from the IRS to hamper its ability to enforce the law’s tax hikes and mandates, and rescinded \$10 million in funding for the controversial Independent Payment Advisory Board. (December 23, 2011)

41. *Slush-fund savings*: Congress slashed another \$11.6 billion from the Prevention and Public Health slush fund and \$2.5 billion from Obamacare’s “Louisiana Purchase.” (February 22, 2012)

42. *Less cash for Louisiana*: One of the tricks used to get Obamacare through the Senate was the special “Louisiana Purchase” deal for the state’s Democratic senator, Mary Landrieu. Congress saved another \$670 million by rescinding additional funds from this bargain. (July 6, 2012)

43. *CLASS Act eliminated*: Congress repealed the unsustainable CLASS (Community Living Assistance Services and Supports) program of government-subsidized long-term-care insurance, which even the Democratic chairman of the Senate Finance Committee dubbed a “Ponzi scheme of the first order.” (January 2, 2013)

44. *Cutting CO-OPs*: Congress cut \$2.2 billion from the “Consumer Operated and Oriented Plan” (CO-OP), which some saw as a stealth public option, blocking creation of government-subsidized co-op insurance programs in about half the states. Early reports showed many co-ops, which had received federal loans, had run into serious financial trouble. (January 2, 2013)

45. *Trimming the Medicare trust-fund transfer*: Congress rescinded \$200 million of the \$500 million scheduled to be taken from the Medicare Part A and Part B trust funds and sent to the Community-Based Care Transition Program established and funded by the ACA. (March 26, 2013)

46. *Eliminating caps on deductibles for small group plans:* Congress eliminated the cap on deductibles for small group plans as part of the SGR “doc fix.” This change gives small businesses the freedom to offer high deductible plans that may be paired with a Health Savings Account. (April 1, 2014)

47. *Making the risk corridor program budget neutral.* The Consolidated and Further Continuing Appropriations Act of 2015 provides that CMS may not transfer funds from other accounts to pay for the risk corridor program. Expenditures cannot exceed the funds collected in 2014, blocking CMS from making multi-year calculations. (December 16, 2014).

CHANGES BY THE SUPREME COURT:

48. *Medicare expansion made voluntary:* The court ruled it had to be voluntary, rather than mandatory, for states to expand Medicaid eligibility to people with incomes up to 138 percent of the federal poverty level, by ruling that the federal government couldn’t halt funds for existing state Medicaid programs if they chose not to expand the program.

49. *The individual mandate made a tax:* The court determined that violating the mandate that Americans must purchase government-approved health insurance would only result in individuals’ paying a “tax,” making it, legally speaking, optional for people to comply.

This list was originally published [HERE](#) on Galen.org and has been published on National Review Online. It was updated to 29 changes on December 10, 2013.

December 13, 2013 UPDATE: 30 changes (PCIP extension)

December 19, 2013 UPDATE: 31 changes (Hardship waiver)

January 14, 2014 UPDATE: 32 changes (Union reinsurance fee exemption)

January 14, 2014 UPDATE: (PCIP extended again)

January 21, 2014 UPDATE: 33 changes (Equal employer coverage delay)

February 3, 2014 UPDATE: 34 changes (Subsidies may flow through federal exchanges) (List is now ordered chronologically)

February 10, 2014 UPDATE: 35 changes (Second employer mandate delay)

March 5, 2014 UPDATE: 36 changes (Subsidies extended outside of exchanges)

March 5, 2014 UPDATE: 37 changes (Consumers can keep non-compliant plans until 2017)

March 26, 2014 UPDATE: 38 changes (Sign-up deadline delayed)

April 7, 2014 UPDATE: 39 changes (Small group deductible cap eliminated-passed by Congress and signed into law)

April 8, 2014 UPDATE: 40 changes (Cuts to Medicare Advantage in 2015 canceled)

May 22, 2014 UPDATE: 41 changes (More funds for insurer bailout)

July 18, 2014 UPDATE: 42 changes (Exempting U.S. Territories)

December 26, 2014 UPDATE: 46 changes (Failure to enforce abortion restrictions; Risk Corridor coverage; Transparency of coverage; Bay State Bailout)

January 7, 2015 UPDATE: 47 changes (Making the risk corridor program budget neutral)

February 24, 2015 UPDATE: 48 changes (Tax penalty pass)

March 2, 2015 UPDATE: 49 changes (Reducing cost sharing reductions)

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The Regulatory State: Beyond The Founder's Vision – Guest Essayist: Peter Roff

Among the things we have to thank the French for is the invention of the bureaucracy, which more than one dictionary defines as a system of government in which most of the important decisions are made by state officials rather than by elected representatives.

It may be that, more than anything else, the rise of the bureaucratic state is responsible for the erosion of the constitutional separation of powers envisioned by those who wrote the Constitution. More than partisanship (or as Madison called it “factionalism”) or the differences in the role the federal government should play in the life of the nation, the stasis that exists among the permanent class of clerks and lawyers and administrators that compose the actual working heart of the various departments and agencies that make up the executive branch may be the principle cause of our current concerns.

All too often those responsible for writing the nation's laws turn over the responsibility for how they are to be carried out to the same people charged with enforcing them. To put it another way the devil is in the details – and the details are left to the professionals, the government employees who are supposed to serve each president with equal fervor and vigor.

To a considerable degree this is not possible. The first loyalty of a Washington bureaucrat is to his or her program, not to the president and not to the Constitution.

Consider the problem of “sue and settle” in which those working for a particular branch of government seeking to enact a change in policy will encourage an outside party to bring suit against the government. The decision by an agency, say the U.S. Department of Justice, to settle the suit rather than contest it allows for the making of what can and should be considered “new law” without Congress being involved. With more and more agencies writing regulations that have both civil and criminal penalties attached this is a trend that jeopardizes our basic liberties in a major way.

Scholars have only recently begun to examine this matter with any seriousness. There is no agreed upon number of federal regulations that carry criminal penalties that were not specifically authorized in legislation. It would be useful for Congress to order a study from the Government Accountability Office to find one so that a national conversation on the matter can start. But when the occupants of the nation's prisons include commercial fisherman who caught too many

fish or the wrong kind of fish on the wrong day and people whose lack of cooperation in a federal investigation were subjectively determined (meaning their activities were judged largely by the investigators rather than weighed against a black letter definition of the law) to have committed the crime of obstruction, things have gone too far.

Regulations themselves have very real costs associated with them. The Competitive Enterprise Institute, a Washington-based think tank, in its annual report *Ten Thousand Commandments* recently determined that the hidden tax imposed by the regulatory state has reached \$1.88 trillion per year over and beyond what the U.S. Treasury collects.

These costs, which often originate from the decisions and actions of unelected, largely unaccountable individuals with their own policy axe to grind, inflate the price we pay for goods and services, affect the wages workers earn, the number of jobs created, and lead ultimately to a lower standard of living, prosperity and economic growth than might otherwise be the case.

Consider that, as the CEI report found:

- If U.S. federal regulation was a country, it would be the world's 10th largest economy, ranking behind Russia and ahead of India.
- In 2014, agencies issued 3,554 new regulations compared to 224 new laws. That's a pace of 16 regulations for every law.
- The 2014 Federal Register contains 77,687 pages, the sixth highest page count in its history. Among the six all-time-high Federal Register total page counts, five occurred under President Obama.
- Some 60 federal departments, agencies and commissions have 3,415 regulations in development at various stages in the pipeline. The top six federal rulemaking agencies account for 48 percent of all federal regulations. These are the Departments of the Treasury, Commerce, Interior, Health and Human Services and Transportation and the Environmental Protection Agency.

It is not too far a leap to presume that, through these actions and those like them, the departments and agencies (whether independent or not) that make up the executive branch have taken for themselves the role of legislator as well as executor. This was not what the founders envisioned for the federal government, which to succeed in perpetuity depended on a system of checks and balances producing tensions that slowed the actions of government. What the modern state has done is streamline the process, and not to the good.

Peter Roff, a member of Constituting America's advisory board, is a U.S. News and World Report contributing editor and a commentator appearing on the One America News Network. He lives in Washington, DC.

Stop Using The IRS As A Bludgeon – Guest Essayist: James D. Best

American citizens should never fear their own government. It's Un-American. The Declaration of Independence directed our Founders to organize government powers "in such form, as to them shall seem most likely to effect their safety and happiness." We should be able to go to bed at night feeling safe from hostile pounding on the door. The concept of the home as a safe refuge has been a key principle of Western Civilization going all the way back to the Roman Republic.

For the most part, our homes are safe havens from physical intrusion by agents of the government. This doesn't mean we can reside comfortably in "safety and happiness." The government now attacks its citizens with a #10 envelope. Washington feels far off until we come across a letter from the Internal Revenue Service.

Suddenly, we are no longer safe in our homes.

The clog-stomping IRS panics most Americans. How much trepidation should you feel when you spy an official IRS envelope? It may depend on whether you've been expressing views that run counter to the proper way of thinking. The Congressional Ways and Means Committee reported that the IRS audited nearly 10% of taxpayers who contribute to a Tea Party group. Nationally, less than 1% of taxpayers suffer audits. One of the inappropriate activities called out by the inspector general included IRS requests for Tea Party donor lists. It appears the IRS put these lists to bad use.

Many high-profile conservatives have been audited, including Dr. Ben Carson soon after he spoke at the National Prayer Breakfast and courageously challenged President Obama's leadership. However, Wayne Root may be the only one with evidence that politics motivated his audit. Judicial Watch obtained his IRS files under the Freedom of Information Act and the dossier revealed that a Democratic senator initiated the audit, and handwritten notations showed that the IRS had investigated Root's political writings and television appearances. Root's transgression? He was President Obama's classmate at Columbia and a severe critic of his administration and "transparency." As if to prove the latter point, the IRS stalled in complying with the FOIA request for 14 months, despite a law that required a 30-day response. It's not a mystery why the agency stalled. Tom Fitton, president of Judicial Watch, wrote, "These documents show the Obama IRS scandal was more than just suppressing the Tea Party, it was also about auditing critics of President Obama."

And what about that IRS targeting scandal? It doesn't get much attention anymore. On the second anniversary of the inspector general's report, Cleta Mitchell wrote an opinion piece for the May 15, 2015 edition of the *Wall Street Journal*. Instead of a progress report, "How Congress Botched the IRS Probe" lamented the lack of consequences for wrongdoers. Unlawful targeting of selected organizations, audits of vocal critics, perjury before congress, loss of two-years' worth of email records, IRS employees cheating on their taxes, and insolently shoddy cover-ups. The result? Promotions, rehiring, and performance bonuses. Lois Lerner, who was found in contempt of congress, suffered no penalty because the Justice Department refused to act on the citation. This is "in your face" defiance of oversight. Perhaps it all went away because President Obama dismissed the inspector general's findings of malfeasance by simply stating

that there was “not even a smidgeon of corruption” at the Internal Revenue Service.

In case you think this is all ancient history, *The Washington Times* reported less than a month ago that nine tea party groups are still awaiting IRS approval for nonprofit status.

These IRS scandals do not represent executive overreach, they reflect an abuse of power. And a grievous example at that. The Framers did their best to protect us from abuse of power, but they depended on limited government and checks and balances to restrain politicians’ worst impulses. Unfortunately, Congress can’t seem to figure out how to use its assigned powers to reign in executive overreach. They’re nonplussed by their rivals’ audacity, and congressional leadership seems intimidated by media and special interest criticism.

There remains another check on abuse of power: We the people. It’s up to us to buck up our politicians and remind them that they represent us, not the vocal denizens inside the beltway. We hired them, and we can fire them. They need frequent reminding. As Dean Martin used to say, “Keep those cards and letters coming in.”

James D. Best, author of [Tempest at Dawn](#), a novel about the 1787 Constitutional Convention, [Principled Action](#), and the [Steve Dancy Tales](#).

The Executive Branch’s Growing Disrespect For Administrative Due Process – Guest Essayist: Lawrence J. Spiwak

Given the pervasiveness of regulation over the American economy, ensuring procedural due process for all Americans wishing to participate in both adjudications and rulemakings before administrative agencies is no easy task. Indeed, unlike Congress—which is a political institution specifically designed by the Founding Fathers to promulgate laws based on the will of the people—an administrative agency, *as a creature of Congress*, is specifically designed to be *apolitical* so that it can implement the will of Congress by following its particular governing statute (e.g., the Federal Communications Commission and Communications Act; the Federal Energy Regulatory Commission and the Federal Power Act). For this reason, we have the Administrative Procedure Act, which requires, among other things, administrative agencies to provide interested parties with a meaningful (and orderly) opportunity for notice and comment regarding agency decisionmaking, and to disclose any private meetings with outside parties which may have a material impact on this decisionmaking (what are known as “ex parte” rules). By establishing such procedural safeguards, an administrative agency can (ideally) make dispassionate decisions based on the law, economics and the facts before it, rather than succumb to outside political pressure.

Recently, however, there is a growing and disturbing trend in the way regulatory policy is practiced in Washington. According to the Wall Street Journal, given Congress’ increasing deadlock, we have seen a dramatic increase by advocacy groups on both sides of the aisle to flood administrative agencies with perfunctory “robo-comments” to express the *vox populi* on particular policy items at hand. While I certainly do not want to be accused of denying anybody’s free speech rights, as a former lawyer in the general counsel’s office of two federal

agencies, experience has taught me that these “robo-comments” generally offer nothing of substance, which doesn’t help a regulator write a legally-defensible order on highly-technical issues that will be upheld by a reviewing court. However, as the regulatory process becomes more contentious, and Congress more impotent, administrative agencies (who are headed by political appointees) are nonetheless increasingly giving these “robo-comments” probative weight. The problem with this growing practice is that the arrival of thousands (or in the case of the FCC’s recent fight over net neutrality *millions*) of robo-comments does *not* constitute the proverbial “weight of the evidence.” All these robo-comments amount to is administrative law vigilantism.

While the growing use of robo-comments is problematic, what is more disappointing is that the Obama Administration is encouraging such populist “clactivism” as a substitute for reasoned analysis. In fact, rather than provide substantive legal and economic contributions to regulatory proceedings, President Obama has become the “Clactivist in Chief.” In so doing, the President is, in effect, eroding both the rule of law and the confidence in the government institutions he swore to protect.

Let me provide just two examples:

In 2012, after a lengthy administrative process (with full opportunities for notice and comment), the Librarian of Congress found that that a customer’s unlocking of a mobile handset without the consent of the wireless carrier is unlawful in that it violates provisions of the Digital Millennium Copyright Act. The Librarian found that:

with respect to new wireless handsets, there are ample alternatives to circumvention. That is, the marketplace has evolved such that there is now a wide array of unlocked phone options available to consumers. While it is true that not *every* wireless device is available unlocked, and wireless carriers’ unlocking policies are not free from all restrictions, the record clearly demonstrates that there is a wide range of alternatives from which consumers may choose in order to obtain an unlocked wireless phone. (77 Fed Reg. 65265) (Emphasis in original.)

However, rather than support the Librarian’s decision, the White House chose instead to criticize the Librarian’s handling of the case and publicly promised to find ways to undermine the Librarian’s factual findings. As you can’t fight City Hall forever, the wireless carriers eventually capitulated and instituted a “voluntary” program to promote handset unlocking. Unfortunately, such a decision did not bode well for American consumers: as we at the Phoenix Center predicted in a published paper in 2007, by breaking the “complementarity” between the handset and the service, wireless carriers have all but abandoned the long-standing practice to provide consumers with subsidized handsets, resulting in *slower diffusion of new technology, diminished innovation in mobile handsets, and, most egregiously, higher handset prices.*

But while as bad as the Administration’s willingness to attack a fair and open proceeding before the Library of Congress was, nothing compares to the Administration’s conduct during this year’s hotly debated net neutrality fight. As is well-documented by now, last summer President Obama took his eyes off wars in the Middle East and the Ebola virus crisis to weigh in on net

neutrality, issuing a statement (accompanied by a short video) where he “asked” (because he cannot order) the Federal Communications Commission (FCC) to reclassify “consumer broadband access” as a Title II common carrier telecommunications service. In so doing, President Obama advised the FCC to reverse nearly 20 years of bipartisan policy to apply a “light touch” to the Internet. Significantly, the White House did not try to engage substantively in the debate (which is not surprising, given that the President’s statement was replete with technical errors on the facts, economics and law), but instead chose to engage in political sophistry and encouraged aggressive “clicktivism” against the FCC (and, by extension, create an environment where progressive activists believed it acceptable to stalk FCC Chairman Tom Wheeler at his home) to put political pressure on the Commission to regulate the Internet. And guess what? The President’s political pressure worked, and the FCC has now subjected the Internet to legacy regulations designed for the old “Ma Bell” telephone monopoly.

In sum, complex regulatory policy should not be made by a “popularity contest” of who filed the most robo-comments, but by a careful and dispassionate examination of law, economics, and the record presented before the agency. It is a pity that the President of the United States, as our nation’s chief law enforcement officer, does not appear to respect this basic principle.

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What Government By “The Consent Of The Governed” Looks Like – Guest Essayist: Brion McClanahan

The only way for the United States to wrestle the reins of power from the general government is a renaissance of State powers as codified by the Tenth Amendment to the Constitution. Only then will we have true government by the “consent of the governed.”

It would be easy, perhaps even cliché, to classify President Barack Obama as the worst president in American history. There would be truth in such a claim. But President Obama is, in reality, nothing more than a symptom of the greater disease, that being unchecked executive overreach, a process that began in George Washington’s second term and has continued virtually unabated since. There are exceptions, and pointing them out is easier than listing every unconstitutional act by the presidents who have violated their oath to “preserve, protect, and defend the Constitution of the United States.” The list of unconstitutional king-like presidents would be a veritable who’s who of almost every “great” president in American history. The twentieth and twenty-first centuries alone are littered with examples of egregious executive usurpation of power, much of it with congressional approval. From President Teddy Roosevelt and Woodrow Wilson to Franklin Roosevelt, Harry Truman, Lyndon Johnson, Richard Nixon, the Bushes, Bill Clinton, and Obama, it’s a crowded field.

Because 2016 is a presidential election year, perhaps it would be better, if not more productive, to highlight three men who took their oath seriously, namely Presidents John Tyler, Grover

Cleveland, and Calvin Coolidge. They should be the examples by which all Americans judge the presidency. None were pushovers. They all correctly believed in a strong executive branch, but in the way the founding generation conceived of the office. Congress was to be the most powerful branch of the general government, but the President, though the veto power, could “defend” the Constitution from unconstitutional legislation. That was the key. In his first administration, Washington opined that the President was obligated to let all constitutional legislation pass, and that it should be accepted in toto. Signing statements, executive orders that invalidate legislation, or any other executive trick designed to essentially legislate from the executive mansion would neither be constitutional nor proper according to Washington or any other member of the founding generation for that matter. If the President did not believe the legislation was constitutional, he could veto it, but it must be noted that the first five Presidents rarely used the veto (only ten were issued from 1789-1825), and until the twentieth century, the ability for the executive to override legislation was never considered to be a legislative hammer wielded for partisan purposes. The founding generation considered that to be an impeachable offense. Americans should take notice.

With that said, why were Tyler, Cleveland, and Coolidge great? None are household names, and all three are more likely to be slick trivia questions than serious candidates for a re-carved Mt. Rushmore. Tyler was expelled from the Whig Party for refusing to sign the clearly unconstitutional legislation streaming down Pennsylvania Avenue from his own Party. He once told Henry Clay, the highly partisan and ambitious leader of the congressional Whigs, “...Go you now, then, Mr. Clay, to your end of the avenue, where stands the Capitol, and there perform your duty to the county as you shall think proper. So help me God, I shall do mine at this end of it as I think proper.”^[1] Tyler axed a renewed national bank, a higher tariff, and internal improvements legislation all because the Constitution did not grant the general government the power to enact such laws. How refreshing.

Cleveland vetoed more legislation during his two terms in office than all of the previous presidents combined. Most of the vetoes were used to invalidate fraudulent pensions from scheming loafers and their dependents, including one who insisted that “sore eyes among the results of his diarrhea” merited an increase in his pension.^[2] He also constitutionally straightened out the economy in 1893 after Congress—with President Benjamin Harrison’s blessing—ruined it in the preceding four years, followed a constitutionally sound foreign policy that involved the Senate in foreign policy decisions, and advocated lower spending and lower taxes. When Congress did not act on all of his “recommendations,” he left the issue alone. There would be no legislative pressure from the executive branch.

Coolidge followed a similar path. Like Tyler, he assumed the presidency after his predecessor died in office, and like Tyler thought the president should steer the ship of state by blocking congressional attempts to sink it. Coolidge had a simple maxim in regard to executive power: “All situations that arise are likely to be simplified, and many of them completely solved, by an application of the Constitution and the law.”^[3] He twice vetoed a popular agricultural bill because it was not only unconstitutional, it was bad economic policy. He resisted federal aid to flood victims along the Mississippi River because he correctly argued it was a State and local issue. At every turn, Coolidge reinforced federalism and resisted executive government. That cannot be said for almost every other president of the last 115 years.

If Americans want good government, they should cease looking to the executive branch as the solution for every problem facing the United States, be it crime, education, or poverty. All of those issues were to be left to the States by the original Constitution. It was not long ago that Americans believed in real federalism. The only way for the United States to wrestle the reins of power from the general government is a renaissance of State powers as codified by the Tenth Amendment to the Constitution. Only then will we have true government by the “consent of the governed.” An elected king with unlimited power can never provide that type of government. It will always be liable to abuse at the behest of big donors and powerful special interest groups. The executive branch of 2015 wields more power than George III had in 1776, but the States and the people thereof are the panacea, not a “better” president in Washington. The institution can never be reformed from the inside. History has proven that. I’d vote for John Tyler, Grover Cleveland, or Calvin Coolidge in 2016, but unless science can resurrect the dead, it would be better to focus our efforts at home and thwart Washington through the constitutionally correct method of State intervention.

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Common Core: Federal Overreach Into A State Issue – Guest Essayist: Hadley Heath Manning

The words “education,” “schools,” and “curriculum” do not appear in the U.S. Constitution or any Amendments. This is not to say the Founders were not supportive of public education. Many of them, most notably Thomas Jefferson, wrote in support of the concept because they believed that, “an educated citizenry is a vital requisite for our survival as a free people.”

Importantly, the Founders envisioned that the states would promulgate and implement policies related to public schools, which is why many state constitutions lay the groundwork for education policy. But today our education system is very different from the one the Founders imagined. Despite the limits of the Constitution, the federal government has a heavy hand in education policy. This overreach is harmful to state autonomy, and impedes the flexibility of students and educators.

First, it is important to understand the Founders’ motive in keep education within the realm of the states. The American founding celebrated (and indeed much of American culture today still celebrates) individualism. We understand that each child’s mind is unique and the process of learning may be different from child to child. Not only that, but each state’s population is unique. Some states may see fit to include more agricultural classes; others may have little need for such a curriculum.

The Founders understood that the fewer decisions the federal government makes, the more

decisions are left to states, local government, teachers and students.

But this principle has slowly eroded. The federal government's role in education expanded incrementally during the second half of the twentieth century. The federal government led the way in desegregating schools in the 1960's. In 1965, President Johnson created the federal Head Start (preschool) Program. In 1979, President Carter established the Department of Education.

More recently, the No Child Left Behind Act of 2001, signed by President George W. Bush, tied federal Title I dollars to state education policy decisions, and non-participating states stood to lose millions of education dollars. This is the main mechanism for federal involvement in education policy. The Spending Clause has allowed the federal government to manipulate state policies through conditions upon federal money.

The Spending Clause, found in Article 1, Section 8, Clause 1, states, "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States."

Today perhaps the most influential (and most controversial) education policy matter is the Common Core Standards Initiative. It is a set of math and English standards for each grade level. Like many other education policy ideas, Common Core is a well-intentioned effort to raise expectations for students and provide a higher quality of education for them.

Defenders of the Common Core will say that it is not a federal program; it is state-led. Indeed, states do have the freedom to opt out of the common core standards. So far, 45 states have opted in, and five states have opted out.

The Common Core Standards Initiative is related to the federal Race to the Top program, introduced in 2009. Race to the Top is essentially a competition among the states for federal cash, \$4.35 billion in total. In order to even participate in this competition, states must implement college and career-ready standards and assessments.

Most states clearly understood this to mean acceptance of the Common Core Standards. Only Alaska, Nebraska, Texas, Virginia and Minnesota opted not to adopt the standards (and MN only opted out of the math standards). Even these opt-out states are required to develop other standards to participate in Race to the Top.

There has been much heated debate about the standards and their educational content. Criticisms include: The Standards are not rigorous enough. The English standards do not include enough classic literature. The content is politicized, favoring labor unions and universal health care. The content is not age-appropriate.

But a review of the curriculum is beyond the scope of this essay. It should suffice to say that all of this debate is evidence that the Founders were right: People from various states, cultures, and backgrounds should not have to agree on one-size-fits-all educational standards or assessments. Taking away this flexibility from states, even if only by bribing the states with federal cash, has taken us far from the vibrant and diverse educational system the Founders envisioned for

American children.

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Presidential Power And The “Nuclear Deal” With Iran – Guest Essayist: Joerg Knipprath

One of the most controversial recent presidential actions is the Obama administration's desire to enter a “nuclear deal” with Iran. To prod Iran into an agreement that he appears desperately to want, President Obama intends to waive sanctions imposed under earlier legislation and executive action. As shown by an open letter to the Iranian government authored by Senator Tom Cotton and signed by 47 Republican senators, a hotly-debated aspect of the deal is which role, if any, Congress would play in this spectacle.

The Constitution says relatively little about the mechanics of foreign relations. The President has the power to make treaties, which are to be approved by a 2/3 vote of the Senate. Beyond that clear delineation of constitutional authority, the President has various ill-defined powers, principally the “executive power” and the “commander-in-chief” power that allow him to conduct foreign relations. For example, those powers have provided one basis for Presidents to enter into “executive agreements” with other countries' leaders. In addition, a tremendous source of presidential power to enter into executive agreements or to make executive orders comes from broad delegations of power given to them through congressional authorization. After all, the issue of removing sanctions as part of a nuclear deal is directly traceable to legislation that Congress passed that authorized the President to waive those sanctions. Congress as a whole, in turn, may have some influence over foreign affairs if a treaty requires further legislation for implementation, or by passing statutes that affect the rights of Americans in their dealings with foreign entities. Travel and trade restrictions with Cuba are an example of the latter.

This interplay of legislative and executive powers distinguishes the Constitution from its English antecedents. Under English practice at the time of the early American republic, the king had formal control over foreign affairs, though Parliament had substantial influence through its powers over taxation and spending. The king's power over foreign relations traditionally was seen as distinct from his powers over domestic affairs. John Locke, the “philosopher of the Glorious Revolution,” in describing his view of divided power in the English constitution, referred to that royal prerogative as the “federative” power. It stood apart from the powers over domestic policy that were apportioned between the king and Parliament and included the king's executive powers, such as, to appoint officers. Alexander Hamilton, in number 69 of *The Federalist*, used Blackstone's similar description of the English system to differentiate it from the Constitution's formal treaty process.

However, formal treaties are, as noted, only one component of foreign relations. The Supreme Court has added its own interpretations of the murky and relatively fluid constitutional settlement regarding foreign relations. For example, in the 1936 case *U.S. v. Curtiss-Wright Export Corp.*, Justice George Sutherland undertook a staunch defense of federal power, in

general, and executive power, in particular, over foreign affairs. Sutherland pointed out that the “powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.” An additional such power, Sutherland wrote, was the “power to make such international agreements as do not constitute treaties in the constitutional sense.”

More significant, Sutherland squarely placed the main authority for foreign relations with the President. He bluntly rejected any role for the Senate or the Congress as a whole in the negotiation of treaties. He quoted approvingly from a speech John Marshall made as President Adams’s Secretary of State, that the President is “the sole organ of the nation in its external relations” In addition, he referred to an early Senate Foreign Relations Committee report from 1816 that declared, “[The President] manages our concerns with foreign nations and must necessarily be most competent to determine when, how and upon what subjects negotiation may be urged with the greatest prospect of success....[The committee] think the interference of the Senate in the direction of foreign negotiations calculated to diminish that responsibility and thereby to impair the best security for the national safety. The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch.”

In similar vein, Sutherland invoked President Washington’s refusal, on executive privilege grounds, to deliver to the House of Representatives instructions and correspondence relating to the negotiation of the Jay Treaty of 1794. Washington cited the need for confidentiality and the delicacy of foreign relations: “The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers.”

While Justice Sutherland’s disquisition on the nature of sovereignty, its constitutional anchorage, and its historical evolution have triggered much criticism, his discussion of the preeminence of the President in foreign relations is constitutionally unremarkable. But it is hardly the case that the President is an entirely free actor in foreign affairs. As the Senate Report cited by Justice Sutherland in *Curtiss-Wright* also emphasized, the President is still responsible to the Constitution. It remains to be seen whether or not that continues to be “the surest pledge for the faithful discharge of his duties” in today’s personal-legacy-driven view of the presidency, where getting suitable materials for display in the secular cathedrals known as presidential libraries takes on ever-greater urgency.

Nor is it the case that the Cotton letter was unprecedented. To take just one of many instances where Congress much more directly inserted itself into executive conduct of foreign relations, during the Reagan administration, Congress passed a series of laws known as the “Boland Amendments.” While they prohibited the intelligence agencies from using funds to assist, even indirectly, the Nicaraguan “Contras” fighting the communist Sandinistas, Democrats read the prohibition much more broadly, as applying to the President because of his connection to U.S.

intelligence agencies. Indeed, it was said to apply even if the President merely urged private support of the Contras or talked to a foreign leader to help them. Democratic Representative Dante Fascell, the House Foreign Relations chairman boasted that these amendments “can stop him from doing almost anything” regarding the Contras. In an ironic, yet entirely predictable twist, the same factions that supported muzzling the President then, today demand that the Senators be muzzled. Indeed, a number of their acolytes in the press and among the “intelligentsia” have gone so far (and shown their ignorance of the Constitution in doing so) as to accuse Senator Cotton and the other signatories of the letter of having committed treason—for publishing this open letter on his own website.

By well-established constitutional custom rooted in practicality, then, the President has much more discretion to conduct foreign relations than domestic affairs. Dissatisfaction with the particulars of the current administration’s handling of the Iran nuclear negotiations must not undermine that constitutional reality. Rather sooner than later, one hopes, a less naïve and personality-driven administration will be elected, and that same flexibility and discretion will yield less disastrous results. In the meantime, a deal with Iran, if one is concluded, is better challenged on its policy failures.

An expert on constitutional law, Prof. Joerg W. Knipprath has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums. Read more from Professor Knipprath at: <http://www.tokenconservative.com/>.

The Constitutional Tools Of Foreign Relations – Guest Essayist: Professor Joerg Knipprath

When Barack Obama was elected in 2008, much was made in the press of the perception that this event reflected voters’ fatigue with foreign entanglements and a turning inward to domestic issues. While there is truth to that, events are not controlled by voters’ sentiments and have a way of upsetting comfortable delusions. It might be said, with apology to Leon Trotsky, “You may not be interested in international conflict, but international conflict is interested in you.” Thus, by 2012, Russia rising, Iraq fracturing, Syria boiling, China blustering once again placed foreign relations on the political radar. Still, Mitt Romney’s warnings about, for example, Russia as the preeminent geopolitical threat, fell on insufficient numbers of listening voters’ ears, and Barack Obama was re-elected.

If anything, given the administration’s continuing unwillingness to lead anywhere but from behind, foreign relations have become more urgent. This is a matter that could cause some embarrassment to the erstwhile secretary of state, Hillary Clinton, if the press were inclined to trouble her with such things. Emblematic of the current state of affairs is the diplomatic kabuki with Iran over its nuclear enrichment program. However, going well beyond Iran, the next president will need to clean up various foreign policy messes left by the current administration,

requiring a “reset” (to borrow a term from that same secretary of state) of American political focus. That president, along with the next Congress, will need to employ the various tools, diplomatic, political, economic, and—one hopes, least likely—military.

It is useful to present an overview of the constitutional tools available to conduct foreign relations. Formally, Article II of the Constitution provides for the president to make treaties, which must be approved by 2/3 of the Senators voting. Treaties are diplomatic arrangements, and their tool of “enforcement” is through negotiation with, or confrontation of, a breaching party by the other party or third parties, for example, the United Nations. The various Geneva conventions on the treatment of prisoners of war are such arrangements. Treaties form a kind of positive morality, not truly law, in that there is no formal enforcement mechanism that can coerce a strong violator. Therefore, if China wants to flout a treaty obligation, there is no way to coerce it into seeing the error of its ways.

As to the United States, a treaty is not part of the domestic law *tout court*, enforceable against private citizens or public officials by suit in the domestic courts. For a treaty to be law, it must either be a “self-executing” treaty or be made part of the domestic law by some further action of Congress. A “self-executing” treaty is one that, in addition to being a diplomatic arrangement, expressly provides that, by its adoption alone, it automatically becomes part of the domestic law. The Supreme Court has correctly held that a treaty is presumed to be “non-self-executing.” It requires contrary language in the treaty to make it unmistakably clear that, by approving the treaty, the Senate is making it part of the domestic law.

Alternatively, if, as usual, a treaty is “non-self-executing,” further explicit action may incorporate its provisions into domestic law to be applied by the nation’s courts. For example, Congress may adopt provisions of a tax treaty into domestic law by passing general legislation to that effect or adopting specific laws that reflect the applicable treaty provisions. A bare majority of the Supreme Court made the dubious judgment in *Hamdan v. Rumsfeld* in 2006, that Congress had incorporated certain specific provisions of the Geneva conventions into domestic law by adopting the Uniform Code of Military Justice. As a consequence Hamdan, who was Osama bin Laden’s driver, bodyguard, and general factotum, could bring a claim in an American court, and that court could decide that Hamdan could not be tried in a military commission set up by order of President Bush.

While Congress could make a treaty obligation into a judicially enforceable aspect of domestic law, a president could not do so unilaterally through an executive order. Thus, in *Medellin v. Texas*, in 2008, the Supreme Court rejected President Bush’s directive that the Texas state courts must comply with a decision of the International Court of Justice. The United States had agreed at least partially to ICJ jurisdiction as a part of its treaty obligations with the United Nations. While a bill passed by Congress and signed by the president could make the principle of the ICJ’s decision part of American domestic law and, thus, binding on the state courts, presidential unilateralism could not.

In addition to treaties, presidents can enter into executive agreements with the leaders of other foreign nations. Executive agreements have been used since the Washington administration. However, they have changed significantly in scope and number. Originally, they were used to

work out relatively minor or pro forma procedural matters that resulted from a treaty. Most foreign relations that bound the U.S. were set by treaty.

The Framers consciously took from the executive the sole power to control foreign relations that the king formally had enjoyed under the British constitution. Alexander Hamilton in *The Federalist* No. 75 gave an intriguing explanation. He argued that such a power is less dangerous in a hereditary monarch than in an elective president. The former, being identified in person with the country, is unlikely to be corrupted by foreign powers. On the other hand, “a man raised from the station of a private citizen to the rank of chief magistrate, possessed of but a moderate or slender fortune, and looking forward to a period not very remote, when he may probably be obliged to return to the station from which he was taken, might sometimes be under temptations to sacrifice duty to interest....” In a passage that might remind one of a would-be president today, Hamilton warns that an “avaricious man [or woman] might be tempted to betray the interests of the state for the acquisition of wealth. An ambitious man might make his own aggrandizement, by the aid of a foreign power....”

Hamilton’s concerns notwithstanding, today, there are far more executive agreements than treaties to which the U.S. is a party. Moreover, they are now used for nearly the same substantive matters as treaties, in part, because presidents have found that anything controversial is unlikely to get 2/3 approval in recent Senates.

Executive agreements may rest on three bases. As mentioned, a treaty may specify that the president will make further agreements with the leader of the foreign nation. Or, Congress may pass a law that authorizes the president to make an executive agreement relating to a particular matter. Either of those paths to an executive agreement has the support of Congress, along with any direct constitutional power of his own on which the president may rely. The third option is for the president to act solely under his own constitutional powers, such as the commander in chief clause. Lacking explicit congressional support, this is the constitutionally weakest form. Like a treaty, an executive agreement can be overridden by an act of Congress. However, such a law requires the president’s agreement, and a presidential veto of such a law requires an override vote by 2/3 of each chamber of Congress. Unlike a treaty, which binds future administrations until Congress and that president decide otherwise, an executive agreement must be reaffirmed by each successive president to remain in effect.

The recent “open letter” of Senator Cotton and 46 other Senators explaining the constitutional status of executive agreements (and, in like manner, of executive orders regarding sanctions) produced an overheated political reaction. However, notably, other than from the would-be constitutional scholars of the Iranian regime, there was no challenge to the letter’s substance.

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Implementing The Affordable Care Act: The Executive Branch's Liberties With Statutory Language – Guest Essayist: Grace-Marie Turner

The Obama administration has spent billions of taxpayer dollars implementing the Affordable Care Act, often taking vast liberties with statutory language. The administration's actions were the subject of a House Ways and Means Oversight subcommittee hearing on Wednesday, chaired by Rep. Peter Roskam (R-IL).

Roskam is calling for a Special Inspector General to investigate the administration's actions and track how tens of billions of dollars have been spent. Implementation of the sweeping and complex law stretches across eight separate federal agencies so no one agency IG can see the patterns and possible abuses taking place.

Rep. Roskam's SIGMA Act (Special Inspector General for Monitoring the Affordable Care Act) would create an ObamaCare watchdog to conduct much-needed audits of the ACA to guard against further waste of tax dollars, such as the extraordinarily expensive and problem-prone exchange websites.

I testified before yesterday's hearing, citing our work chronicling 31 instances in which the administration has issued regulations or guidance that conflict with the language of the statute.

While the ACA has caused enormous disruption to our health sector and economy, these problems have been exacerbated because the administration has played fast and loose with its executive authority. Rather than abide by the law or ask Congress to amend it, the administration has instead made significant changes through regulation, guidance, and even blog posts.

50 changes to ObamaCare...so far

The Galen Institute has tracked the major changes made to the ACA since it was enacted five years ago, and we count at least 50 changes – 31 by the administration, 17 passed by Congress and signed into law by President Obama, plus two changes made by the Supreme Court.

One of the most prominent examples is before the U.S. Supreme Court in the *King v Burwell* case, challenging the IRS regulation that extended premium tax credits to people enrolled in insurance through federal exchanges, even though the statute only allows the subsidies if states create their own exchanges.

Jonathan Adler of Case-Western Reserve University School of Law and Elizabeth Papez, former deputy attorney general, discussed at length the legal considerations in that case and other actions the administration has taken without statutory authority.

I focused in my testimony on additional examples of actions clearly contrary to the statute – such as allowing people to “self-attest” to their eligibility for subsidies in the exchanges and the blatant disregard for statutory trigger dates in delaying the employer mandate.

I also highlighted illegal bonus payments the Obama administration has made to try to postpone cuts required by the law to the popular Medicare Advantage plans for seniors. The nonpartisan Government Accountability Office called for the administration to cancel an \$8.3 billion program it has tapped to pay “quality bonuses” to Medicare Advantage insurance plans – plans often rated average, at best. The administration has ignored calls from the GAO and from Congress to stop the illegal payments.

Lack of transparency

The administration also has been criticized for its lack of transparency in its financing of the implementation of the law. For example:

Co-op funding: The administration last year provided \$300 million in “solvency funds” to co-op health plans. There has been no explanation of the criteria used to give some co-ops added funding and others little or nothing.

Cost-sharing reductions: Ways and Means Chairman Rep. Paul Ryan asked Treasury to explain \$3 billion in payments made to health insurers for cost-sharing reductions, spending never authorized by Congress. The issue is part of the lawsuit filed by House Speaker John Boehner. The administration claims the payments are legal, but it undercut its own argument when HHS asked Congress for appropriations to finance the payments. Congress rejected the funding request, but the administration paid insurers anyway.

Congressional attempts to provide statutory authority rebuffed by administration

There have been numerous instances when the administration has made what many Members of Congress consider to be an illegal change to the law but a change with which they agreed, only to face a veto threat from the White House. For example:

Employer mandate delay: When the administration issued its blog post on July 2, 2013, announcing the employer mandate delay, the House of Representatives later that month passed bi-partisan legislation that would have given legal standing to the delay. But the White House said the president would veto the legislation if it were to reach his desk.

Keep your Health Plan: Similarly, the House passed on November 15, 2013, with bi-partisan support the Keep Your Health Plan Act of 2013. It would have given legal permission to health insurance companies to continue to offer policies that did not meet ACA requirements. The administration threatened to veto the legislation as well.

Legislation which was enacted to provide statutory authority to changing the law

The administration has claimed it made the changes through regulation because Congress refused to consider legislative fixes. But the record proves that wrong:

Repeal of the CLASS Act. After extensive study, the Department of Health and Human Services concluded that the Community Living Assistance Services and Supports (CLASS) Act could not

be self-sustaining as required by law. Congress repealed the CLASS Act on January 2, 2013.

Repeal of the 1099 reporting requirement. On April 14, 2011, Congress repealed the controversial 1099 reporting provision that would have imposed a huge compliance burden on small businesses.

And the Medicaid fix. Couples earning as much as \$64,000 a year would have been able to qualify for Medicaid because of definitions of income calculations in the ACA. Congress saved taxpayers at least \$13 billion when it amended this provision on November 21, 2011.

At least 17 changes to the ACA have been passed by Congress and signed into law by the president, proving that legal changes are possible.

More changes revealed

And writings by Prof. Andy Grewal of the University of Iowa College of Law were highlighted at the hearing, exposing new evidence that the administration is disregarding the statute in implementing the law:

Premium tax credits for some people under 100% FPL and for unlawful immigrants: The ACA allows tax credits to U.S. citizens with incomes between 100 and 400% of FPL, but IRS rules expanded the eligibility to extend the credits to citizens below 100% in some cases.

Also, Section 36B of the ACA grants credits to some non-citizens with low-incomes only if they are themselves lawfully present in the U.S. and cannot obtain Medicaid coverage. However, IRS regulations contradict the statute and allow subsidies if “the taxpayer *or a member of the taxpayer’s family* is lawfully present in the United States,” and “the lawfully present taxpayer *or family member* is not eligible for the Medicaid program.”

Reform was needed

Our health sector definitely needed reform, especially to expand coverage to millions of people who had been shut out of insurance in the past. There was bi-partisan support in Congress when bills were being debated to achieve these goals.

But instead of pursuing a targeted, bi-partisan solution, the vast Affordable Care Act was pushed through on a strictly partisan basis with unusual parliamentary maneuvers. This process did not leave Congress the usual ability to fix the many problems with the language in the Senate bill.

However difficult it may have been to implement this complex law as it was written and passed, the administration does not have the authority to amend it and spend billions of taxpayer dollars without congressional approval. Only Congress can change laws.

The hearing yesterday proved conclusively the need for a special inspector general to create an ObamaCare watchdog to conduct audits of the ACA and guard against further abuse of the constitutional process and waste of tax dollars.

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<http://www.forbes.com/sites/gracemarieturner/2015/05/21/house-chairman-calls-for-obamacare-watchdog/>

Executive Overreach And Its Effect On The Constitution's Structural Safeguards Of Liberty – Guest Essayist: Professor Joerg Knipprath

A t-shirt I saw recently embodies the ultimate justification for parental authority, “I’m the Dad, That’s Why.” Of course, substituting “Mom” works, as well. President Obama’s claims of executive authority to act when Congress fails to enact his vision about immigration matters, Obamacare, or the environment, similarly appears to be, “I’m the President, that’s why.” As a t-shirt slogan, it works; as constitutional doctrine, not so much.

The Constitution gives the President considerable potential to wield broadly discretionary power, from the oath by which he swears to “preserve, protect, and defend the Constitution,” to the clause that vests the “executive power” in the President, to his constitutional position as “commander-in-chief” of the armed forces, to his power to “take Care that the Laws be faithfully executed.” There are few, if any, formal constitutional limits to constrain an impatient President in calling on these powers to act unilaterally when, in his view, Congress has failed to accord him his political due. Perhaps no President did so more expansively than Lincoln 150 years ago.

Woodrow Wilson and other early-20th Century Progressives viewed these reservoirs of discretion as a feature of the Constitution. It may have been the only one in what those of his ideology otherwise saw as a Rube Goldberg-contraption that frustrates, rather than facilitates, managerial government. Latter-day Progressives, such as President and Mrs. Obama, who are ideologically driven to transform society fundamentally, yet find themselves hampered in that quest by the mechanics of the constitutional structure, would see great attractiveness in Wilson’s assertion that “[the President’s] office is anything he has the sagacity and force to make it.”

Necessity is said to make its own law, which explains Lincoln’s expansive and, until then, unprecedented use of these executive powers. The Civil War was the costliest conflict in American history, one that represented an existential challenge to the entity wrought in the struggle for independence from Great Britain less than a century earlier. It is not a precedent to resolve ordinary political contests. Providing access to health insurance coverage to a small percentage of involuntarily uninsured Americans, or allowing some number of individuals present in the United States in violation of established law to gain legal status, is different in kind from the unresolvable constitutional issues resolved by blood and iron—to borrow from Otto von Bismarck—at Antietam, Gettysburg, and, finally, Appomattox.

There are, of course, ways that Congress can try to stop presidential overreach. The power over spending comes to mind. The refusal by the Senate to confirm appointments of nominees who

hold extreme and dangerous views on constitutional matters is another. However, the past several years have shown—and none more than this year—that a President determined to rule “by pen or by phone” will find a sufficient number of congressional supporters who will place short-term political gains over long-term constitutional damage and prevent effective resistance to his usurpations.

Another potential source of resistance to executive power is the Supreme Court. There are certainly precedents in which that institution stood against the President. A recent example is the unanimous decision last year in *N.L.R.B. v. Noel Canning*, in which the Court rejected the President’s claim that he could determine when the Senate was “in recess” so as to make appointments without the need for senatorial confirmation. Perhaps the courts will stand fast in the current challenge to the President’s controversial unilateral immigration orders.

Unfortunately, bitter experience has shown that the courts cannot be counted on consistently to pull constitutional chestnuts out of executive fire. The growth of executive powers since their germination in the Washington administration as often has occurred despite Supreme Court decisions as because of them. In the end, all that counts is that this growth has happened.

Ultimately, then, it is the character of the American people and their political leaders that will determine the role of government. Constitutional custom, the way that the relationship between the governed and the governors has incrementally evolved and been accepted, controls the actual practice of government more than do formal constitutional rules. The accretion of executive power has occurred in fits and starts, with President Obama simply the latest enthusiast, though also one of the more ideologically committed to the goal. Moreover, the growth of executive power would be inconsequential, were it not for the bigger problem of the growth of government, especially the federal government, at the expense of individual liberty.

Republics are the most difficult form of government to maintain, as political theorists since Plato have explained. Benjamin Franklin’s response to Mrs. Powel’s query about the form of government the Philadelphia Convention produced succinctly states the point, “A republic, madam, if you can keep it.” “American exceptionalism” was not a conceit that Americans were biologically, psychologically, or intellectually superior to others. It simply meant that a form of government was instituted that was different from the conventional wisdom of the age, and that such a form could provide a foundation for human flourishing.

No one had any illusions about the task, however, and most republicans then believed, as had ancient republicans, that the success of the experiment required a virtuous people and virtuous rulers. Sole reliance on their virtue might not be enough to vouchsafe liberty, as Madison explained in Federalist 51 in defense of the structural safeguards in the Constitution. Yet, formal structural designs would not withstand assaults on liberty without a culturally virtuous people. Madison was blunt, “To suppose that any form of [republican] government will secure liberty or happiness without any virtue in the people, is a chimerical idea.” As federal Judge Learned Hand observed in 1944 in a speech on “I Am an American Day,” “Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it....”

George Washington declared in his farewell address, “Of all the dispositions and habits which

lead to political prosperity, religion and morality are indispensable supports... Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principles.” Benjamin Franklin warned, “Only a virtuous people are capable of freedom. As nations become more corrupt and vicious, they have more need of masters.” John Adams, whose writings throughout his life display the urgency of his concerns about public and private virtue, summarized the point: “Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other.” A whole book can be filled with similarly insistent warnings by those in the founding generation.

The virtues needed for a republic were self-evident to Americans of the founding era. They were the classical virtues, combined with religious faith. Pre-eminent among those virtues was “temperance,” sometimes described as self-control or self-discipline. Justice Felix Frankfurter made the point in the Supreme Court’s classic limitation on executive power, *Youngstown Sheet & Tube v. Sawyer*, “Our scheme of government is more dependent than any other form of government on knowledge and wisdom and self-discipline for the achievement of its aims.”

It would be the height of arrogance to dismiss the connection between self-control or temperance and successful self-government that writers on politic, ancient and modern, have described. They wrote with a keen sense of appreciation of human nature and the lessons of experience. Yet, it seems that, today, as in too many other things, we believe we know better. There is a narcissism and solipsism in our culture that slashes at our civic culture. Among the governed, this is reflected in the culture of entitlement, the belief one is entitled to individual fulfillment paid for by others. Nancy Pelosi’s statement that, with the advent of Obamacare, people could quit their jobs and follow their dreams to become writers is an example. Never mind that “Dependence begets subservience and venality, suffocates the germ of virtue, and prepares fit tools for the designs of ambition,” as Jefferson warned. There is the concomitant belief that certain groups’ rights are absolute, to the point that all others’ rights seen to stand in their way must yield.

Among the political elites, there is the striving for monuments and personal legacies. The naming of public buildings, parks, thoroughfares, and other taxpayer-funded projects after living persons, especially politicians, has the same monarchical scent as the portrayal of such persons on coins and stamps would have. The latter is prohibited by law. Yet, West Virginia might as well have been named Robert Byrd by the plethora of public works named after him while he was still walking among us. A foreign policy driven by the narcissistic desire for a personal legacy and perhaps a Nobel Peace Prize, rather than by the national security and interest of the country, further demonstrates the abandonment of republican ideals.

In short, it is not at all clear that enough of the culture of republican self-control survives to put a brake on the trend to executive government and its dangers for self-government and liberty. We may yet get a president who possesses that virtue. If not, if the people lack those classic cultural virtues, to expect Congress or the Supreme Court to limit a President who considers unilateral executive action the normal constitutional order and Congress as merely a pliant tool to accomplish his personal policy preferences, is a pipedream. After all, as the French philosopher Joseph De Maistre acidly observed, “Every nation gets the government it deserves.”

Few people know the second stanza of “America, the Beautiful.” It calls on God’s assistance, and then urges America, “Confirm thy soul in self-control, Thy liberty in law.” A republican message for the governors and the governed alike.

An expert on constitutional law, Prof. Joerg W. Knipprath has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums. Read more from Professor Knipprath at: <http://www.tokenconservative.com/>.

Undemocratic: How Unelected, Unaccountable Bureaucrats Are Stealing Your Liberty and Freedom (Part 1) – Guest Essayist: Jay Sekulow

By early 2010, two developments were shaking American liberals to their core. The first was the rise of the Tea Party; the second was a Supreme Court case that protected the right of free political speech.

Deeply troubled by multi-hundred-billion-dollar bailouts in the Bush and Obama presidencies, concerned by massive entitlements and looming national bankruptcy, and shocked at the vast reach of the expanding federal government, millions of Americans were mobilizing at the grass roots, showing energy and numbers that were already starting to thwart the Democrats’ plan of a new, permanent majority—hopes that flared after President Obama’s landslide 2008 election, a landslide that was already slipping away by 2010.

At the same time, the Supreme Court of the United States decided a critical First Amendment case, *Citizens United v. FEC*, or simply *Citizens United*.

In that case, decided January 21, 2010, the high court applied decades of First Amendment precedent to reach a rather common-sense holding: Corporations have the right to speak on political matters. Writing for the majority, Justice Anthony Kennedy affirmed that “if the First Amendment has any force, it prohibits Congress fining or jailing citizens, or associations of citizens, for simply engaging in political speech.”¹

It also cleared the way for anonymous donors to fund corporate political speech. While the Left cast this in sinister terms, in reality the decision did little more than reaffirm a core constitutional truth: Americans have the right to band together in associations and speak about political issues. We also have the right to anonymous speech. These two rather noncontroversial principles have been established since our nation’s founding.

After all, anonymous speech helped propel the American Revolution. Anonymous speech, in the *Federalist Papers*, helped ratify the Constitution. Anonymous speech helped protect and advance the civil rights movement. When you speak, the government does not have a right to know who you are.

But to listen to the Left, the combination of Citizens United and the rise of the Tea Party represented the coming of the apocalypse, where shadowy “secret donors” would “Astroturf” (a term for a fake grassroots movement) a political movement to depose the Democratic majority and end its progressive experiments in health care, radical Keynesian economics, and abortion on demand.

On the day of the ruling, President Obama called it “a major victory for big oil, Wall Street, banks, health insurance companies, and other powerful interests that marshal their power every day in Washington to drown out the voices of everyday Americans.” 2

Obama later launched a direct attack on the decision in front of the Justices of the Supreme Court, Congress, and the nation, during his 2010 State of the Union address. He chastised the Justices:

Last week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests—including foreign corporations—to spend without limit in our elections. Well I don’t think American elections should be bankrolled by America’s most powerful interests, and worse, by foreign entities. They should be decided by the American people, and that’s why I’m urging Democrats and Republicans to pass a bill that helps to right this wrong. 3

This comment was not only rated “mostly false” by even the liberal fact-checkers at PolitiFact; it was so at odds with the law and the text of the decision that it caused a visible reaction from Justice Samuel Alito, who simply said “not true.” 4

Justice Alito was correct. The president wasn’t telling the truth. In reality, the decision empowered everyday Americans, allowing them to form grassroots associations, Tea Parties, pro-life groups, and others that magnified their voices and allowed them to impact debates not just about ObamaCare but also about the most local of issues, including the curriculum at the high school down the street.

And it was just this kind of power that the president and his allies at the IRS truly feared.

How do we know? Look at their actions.

In February 2010, the IRS responded to Citizens United, though not by targeting “big oil, Wall Street banks, health insurance, and other powerful interests.” They did not take on Exxon or Goldman Sachs or Cigna health insurance. Instead they pulled every single application for tax exemption by groups whose names included the terms “Tea Party,” “Patriots,” or “9/12,” or other conservative-sounding phrases like “We the People” or “Take Back the Country.” By March 2010, less than two months after the Citizens United decision, the IRS was coordinating this effort out of Washington, D.C., and referred to the cases internally as the “Tea Party cases.” Not the “big oil cases.”

Not the “Wall Street cases.” The “Tea Party cases.”

As 2010 dragged on, the targeting intensified, involving senior IRS lawyers and—critically—the

director of the Exempt Organizations Division of the IRS.

Lois Lerner was a known partisan. Previously at the Federal Election Commission (FEC), she had distinguished herself by her hyperaggressive pursuit of Christian or conservative organizations. Her attacks on the Christian Coalition, for example, were extreme.

I know. I was directly involved in that case, advising the founder of the Christian Coalition while the coalition endured Lois Lerner's unprecedented assault.

My friend and colleague James Bopp, one of the best constitutional litigators in America, also represented the Christian Coalition and described the scope of the investigation in testimony before Congress:

The FEC conducted a large amount of paper discovery during the administrative investigation and then served four massive discovery requests during the litigation stage that included 127 document requests, 32 interrogatories, and 1,813 requests for admission. Three of the interrogatories required the Coalition to explain each request for admission that it did not admit in full, for a total of 481 additional written answers that had to be provided.

The Coalition was required to produce tens of thousands of pages of documents, many of them containing sensitive and proprietary information about finances and donor information. Each of the 49 state affiliates were asked to provide documents and many states were individually subpoenaed. In all, the Coalition searched both its offices and warehouse, where millions of pages of documents are stored, in order to produce over 100,000 pages of documents. 5

It's important to understand why Bopp emphasized the scope of this discovery. In litigation, it's a common (bad-faith) tactic to attempt to metaphorically bury your opponent in a flood of document requests, taxing their resources to the limits to answer information demands. To do this to a nonprofit as part of a massive fishing expedition was both chilling and unacceptable.

The FEC left no stone unturned:

Furthermore, nearly every aspect of the Coalition's activities has been examined by FEC attorneys from seeking information regarding its donors to information about its legislative lobbying. The Commission, in its never-ending quest to find the non-existent "smoking gun," even served subpoenas upon the Coalition's accountants, its fundraising and direct mail vendors, and The Christian Broadcasting Network.⁶

But then it got much worse. The FEC turned its attention to the actual religious content of Christian Coalition activities:

FEC attorneys continued their intrusion into religious activities by prying into what occurs at Coalition staff prayer meetings, and even who attends the prayer meetings held at the Coalition. This line of questioning was pursued several times. Deponents were also asked to explain what the positions of "intercessory prayer" and "prayer warrior" entailed, what churches specific people belonged to, and the church and its location at which a deponent met Dr. [Ralph] Reed.

The FEC put pastors under extreme scrutiny:

One of the most shocking and startling examples of this irrelevant and intrusive questioning by FEC attorneys into private political associations of citizens occurred during the administrative depositions of three pastors from South Carolina. Each pastor, only one of whom had only the slightest connection with the Coalition, was asked not only about their federal, state and local political activities, including party affiliations, but about political activities that, as one FEC attorney described as “personal,” and outside of the jurisdiction of the FECA [Federal Election Campaign Act]. They were also continually asked about the associations and activities of the members of their congregations, and even other pastors.⁷

At one point, the FEC even asked Oliver North what it meant when friends prayed for him, a line of questioning Lieutenant Colonel North rightly found offensive. Yet Lerner pressed on—far more focused on suppressing the Christian Coalition than respecting the First Amendment rights, including religious liberty rights, of American citizens.

And make no mistake, Lois Lerner was a biased, partisan liberal. Years after this investigation, she was caught using her official IRS email account to call conservatives “crazies” and “teRrorists” (yes, she used that spelling), and even used expletives to describe conservative groups.⁸

Speaking of conservatives she heard on radio, she said, “Maybe we are through if there are that many [expletive omitted].”⁹

Then she said, speaking again of conservatives, “So we don’t need to worry about alien teRrorists. It’s our own crazies that will take us down.”¹⁰

In a bureaucracy governed by the Constitution, one that respects the rule of law, defends individual liberty, and is staffed by professionals, using official government email to slander an entire class of citizens would mean the end of a bureaucrat’s career.

Likewise, in a bureaucracy governed by the Constitution, one that respects the rule of law, defends individual liberty, and is staffed by professionals, questioning American citizens about the content of their prayers would mean the end of a bureaucrat’s career.

But when bureaucrats have immense power, enjoy near-absolute job security, and are brazen partisans, this kind of inquiry helps one rocket to the top. And so Lois Lerner found herself in a key position at the IRS, ready to choke off the Tea Party before it had even had the opportunity to fully form.

Lerner—and her numerous IRS colleagues—acted with an enthusiastic cheerleader in the White House, with President Obama even implying that conservative groups were receiving foreign funds. In August 2010, just three months before the November 2010 midterms, President Obama warned about “attack ads run by shadowy groups with harmless-sounding names.” He went on to say, “We don’t know who’s behind these ads and we don’t know who’s paying for them . . . you

don't know if it's a foreign-controlled corporation . . . the only people who don't want to disclose the truth are people with something to hide." 11

*Jay Sekulow is Chief Counsel of the [American Center for Law and Justice \(ACLJ\)](#), which focuses on constitutional law. The ACLJ represents dozens of organizations that were unlawfully targeted by the IRS. Jay is a New York Times bestselling author. The above essay is an excerpt from his latest book, **UNDEMOCRATIC: How Unelected, Unaccountable Bureaucrats Are Stealing Your Liberty and Freedom**. He hosts "Jay Sekulow Live"—a daily radio show which is broadcast on more than 850 stations nationwide as well as Sirius/XM satellite radio. Follow him on Twitter [@JaySekulow](#).*

Excerpt provided by Howard Books, an imprint of Simon & Schuster.

Undemocratic: How Unelected, Unaccountable Bureaucrats Are Stealing Your Liberty and Freedom (Part 2) – Guest Essayist: Jay Sekulow

"Let's translate: when evaluating progressive organizations, the IRS singled out only seven groups for additional scrutiny, asked an average of only 4.7 additional questions, and approved every single group.

By contrast, the IRS singled out 104 conservative groups, asked an average of 14.9 additional questions (some with multiple subparts), and ultimately approved fewer than half," Jay Sekulow.

On September 16, 2010, President Obama was at it again, warning against a "foreign-controlled entity" that could be providing "millions of dollars" for "attack ads." 12 Less than a week later he complained that "nobody knows" who was supporting conservative groups. 13

The campaign continued. On September 21, 2010, the White House tried to enlist the mainstream media. Sam Stein, writing in the *Huffington Post*, described how "a senior administration official . . . urged a small gathering of reporters to start writing on what he deemed the most insidious power grab that we have seen in a long time." 14

Insidious power grab? That describes the IRS, not the pro-life and conservative groups they were at that very moment systematically targeting. It is the IRS that is on the power trip.

What do I mean by "targeting"?

First, a bit about legality and process. One of the best ways to engage in so-called issue advocacy is to form a nonprofit corporation under Section 501(c)(4) of the Internal Revenue Code. While donations to these corporations aren't tax-deductible, the corporation's income isn't taxed, and the donations to the corporation can be anonymous.

This protection—which prevents the government from controlling the message through the power to expose dissenters or to tax dissent—means that so-called (c)(4)s are nearly ideal

vehicles for engaging in cultural and ideological argument, a fact the Left has long known.

Think of the most influential organizations on the Left—like Planned Parenthood, the ACLU, or the radical MoveOn.org. They all have affiliated 501(c)(4)s that enable them to fully engage the public. In short, nonprofit advocacy corporations have been around for a long time, the IRS has dealt with them for a long time, and conservatives had been behind the curve for an equally long time.

The Tea Party started to correct that imbalance, and the IRS was outraged. Normally, a 501(c)(4) application is a simple process: form the corporation, obtain an employer identification number, then complete and file IRS Form 1024, IRS Form 8718, and the appropriate fee.

Typically, the IRS will review the form and approve the application in a matter of months. On occasion, the IRS will respond with a few follow-up questions if the application is unclear or information is missing. Rarely does the process drag on. As I said, the IRS has been doing this for a long time.

But what happened when the Tea Party and other conservatives applied? How were they treated differently from the norm? This chart, from the House Ways and Means Committee, tells the story: 15

IRS Targeting Statistics of Files Produced by IRS Through July 29, 2013

Organization Names*	Total	Questions Asked	Average Questions Asked	Approved	Approved %	Outstanding or Withdrawn
Conservative	8	100	12.5	3	38%	5
Tea Party	72	1012	14.1	33	46%	39
Patriot, 9/12	24	440	18.3	12	50%	12
Subtotal of Conservative Organizations	104	1552	14.9	48	46%	56
Progressive	7	33	4.7	7	100%	0

*One file in the enumerated categories has not been provided by the IRS despite numerous requests.

Let's translate: when evaluating progressive organizations, the IRS singled out only seven groups for additional scrutiny, asked an average of only 4.7 additional questions, and approved every single group.

By contrast, the IRS singled out 104 conservative groups, asked an average of 14.9 additional questions (some with multiple subparts), and ultimately approved fewer than half. This chart was first published in July 2013, and some of the conservative groups waiting for approval were still waiting *as of the end of 2014*.

At the ACLJ, we are litigating on behalf of forty-one groups, some of which had been waiting

for approval since 2009. That means they applied for a tax exemption before the iPad was invented, before LeBron James went to the Miami Heat and won two championships, before the most recent British royal wedding (much less the British royal baby). The list could go on. And the entire time that the Tea Party groups waited for these tax-exemption determinations, they were losing donations, spending hours with lawyers, and answering voluminous questionnaires rather than organizing and advocating for conservative and pro-life ideas.

And what about those questions?

The IRS used the tax-exemption application process to attempt to conduct litigation-style investigations into the funding and operations of not just the Tea Party groups but also their individual volunteers and *their family members*. Here's a sampling of the questions the IRS asked:

Do you directly or indirectly communicate with members of legislative bodies? If so, provide copies of the written communications and contents of other forms of communications.

And

Please describe the associate group members and their role with your organization in further detail. (a) How does your organization solicit members? (b) What are the questions asked of potential members? (c) What are the selection criteria for approval? (d) Do you limit membership to other organizations exempt under 501(c)(4) of the Code? (e) Provide the name, employer identification number, and address of the organizations.

And

Do you have a close relationship with any candidate for public office or political party? If so describe fully the nature of that relationship.

List each past or present board member, officer, key employee and *members of their families* who:

- a) Has served on the board of another organization.
- b) Was, is or plans to be a candidate for public office. Indicate the nature of each candidacy.
- c) Has previously conducted similar activities for another entity.
- d) Has previously submitted an application for tax exempt status.¹⁶

These questions are illegal, pure and simple. They are outside the scope of legitimate inquiry and violate the First Amendment; it is none of the IRS's concern whether a Tea Party board member's father served on his church's board of deacons.

And, remember, these inquiries were not made after any allegation of wrongdoing—or part of any investigation of wrongdoing—but purely as a part of the IRS's “routine” examination of conservatives.

How did we know these kinds of inquiries are illegal?

Because the Supreme Court had considered cases like this before—decades ago, when state governments were using similar tactics to suppress the civil rights movement.

In 1958, in *NAACP v. Patterson*, the state of Alabama challenged the right of the National Association for the Advancement of Colored People (NAACP) to operate in the state unless it disclosed certain information to the state, including its membership lists. The Court, in a short but forceful opinion, denied Alabama's demand, noting:

Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. . . . Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.¹⁷

The Court went on:

It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional rights there involved. This Court has recognized the vital relationship between freedom to associate and privacy in one's associations.¹⁸

In other words, when the government demands to know whom you meet with or work with when you're engaging in political advocacy, that may deter you from joining groups. Would you be more or less likely to join a political organization if you knew that your name and address would be immediately transmitted to the government? Would you be more or less likely to join an advocacy organization if you knew that you'd even have to disclose the activities of your family members? It's simple common sense that Americans want and demand a degree of privacy in their speech and activities. If we're going to speak out, we want it to be on our own terms, not when and how the government tells us to.

So, when comparing the cases, it's plain that the IRS's recent demands of conservative groups went far beyond the state of Alabama's request for the NAACP's membership lists. After all, the compelled disclosures included probing questions about donors and even family members of group leaders—information that went even beyond the information the state of Alabama wrongly demanded from the NAACP.

Not only was the IRS's request for information unlawful—it was also intimidating. Just as Alabama tried to intimidate the NAACP in the 1950s, President Obama's IRS tried to intimidate conservatives throughout his first term and beyond. It is sad and ironic that the Obama administration was using the old tools of segregationists against new political movements like the Tea Party.

At the ACLJ, we knew of Obama administration misconduct before Lois Lerner and the IRS issued their insincere confession and apology. In fact, in March 2012, we demanded answers, asking whether there was a “broad-based IRS assault on the Tea Party.” 19

In response, the IRS lied. Former IRS commissioner Douglas Shulman told Congress that the IRS prides itself on being nonpolitical, and that its scrutiny of conservative groups was typical.²⁰

In reality, based on our clients’ experiences, it was clear the IRS conservative-targeting campaign was in full swing, was being conducted from IRS offices from coast to coast, and was discussed and monitored at the highest levels of the IRS.

Jay Sekulow is Chief Counsel of the [American Center for Law and Justice \(ACLJ\)](#), which focuses on constitutional law. The ACLJ represents dozens of organizations that were unlawfully targeted by the IRS. Jay is a New York Times bestselling author. His latest book “UNDEMOCRATIC: How Unelected, Unaccountable Bureaucrats Are Stealing Your Liberty and Freedom” is available now. He hosts “Jay Sekulow Live”—a daily radio show which is broadcast on more than 850 stations nationwide as well as Sirius/XM satellite radio. Follow him on Twitter [@JaySekulow](#).

Excerpt provided by Howard Books, an imprint of Simon & Schuster.

Department Of Education Power Grab: The “Opt Out” Debate – Guest Essayist: Elliot Engstrom

In communities across America, parents and students are increasingly opting out of onerous standardized tests being pushed by the Department of Education. These assessments, which are directly related to both Common Core and No Child Left Behind, often put young children in high-pressure testing situations for hours on end. In fact, the length of some of these tests is comparable to state bar examinations for aspiring attorneys. And to boot, educational experts are increasingly finding that these tests have little, if any, educational value for children. The context behind this nationwide opt out movement, and the Department of Education’s response, is a prime example of Executive overreach at work in a very intimate part of American family life.

The No Child Left Behind Act of 2001 (NCLB) was passed with the intent of improving public schools nationwide. The law dedicates federal funds to entice schools into improving their standards. Such a broad plan required some sort of measurable, which NCLB’s framers developed in the form of “adequate yearly progress” (AYP). A state demonstrates AYP by testing at least 95 percent of its students in the manner prescribed under the law.

The Executive Branch is charged with enforcing our nation’s laws, including NCLB. So, we must turn to the law to see what sort of penalties exist for failure to comply, and how these penalties are to be administered by the Executive Branch. Unfortunately, we will find that the Department of Education is using NCLB as a tool to threaten the opt out movement with

penalties that have no root in enacted legislation, but rather grow out of the Executive's own policy priority in favor of standardized, top-down education.

First, we have to examine what sort of legal, legislatively enacted penalties exist for schools that fail to demonstrate AYP. The law does in fact provide for certain financial penalties if a school fails to show the requisite progress each year. However, these penalties apply only to schools receiving Title I funds – typically low-performing schools with high numbers of children from low-income families. Nothing in NCLB authorizes the withholding of other forms of federal aid. Regardless, the discussion is becoming increasingly irrelevant, as the Obama administration has granted waivers from federal penalties for most schools. On top of that, even in states without waivers where at least 95 percent of students are taking the tests, many students are not scoring high enough to constitute AYP.

So, under the legislatively enacted NCLB program, it does not appear that schools anywhere are at risk of losing federal funding. But try telling that to the Department of Education, which is actively misleading parents and schools into believing that if they do not submit their children to these assessments, they risk losing federal funds.

Monty Neil of the National Center for Fair and Open Testing has noted that the Executive Branch, through the Department of Education, “confound[s] the law’s requirement that states administer a testing system that covers all children with the non-existent requirement that all children take the test. They imply that a state that allows opting out is at risk of violating NCLB, even though seven states...already have such provisions and none has lost a penny in federal funding...” This is another way of saying that without any sort of legislative mandate, the Department of Education is bullying parents into submitting their children to unnecessary, onerous, and largely useless bouts of testing.

Despite the lack of any legislation forbidding parents or states to opt out of federal testing requirements, the Department of Education is taking a hard stand against the practice. For example, Assistant Education Secretary Deborah Delisle suggested that state superintendents may pressure parents not to opt out. Already in Maine, the State Department of Education is threatening to withhold diplomas from students who fail to take the assessments. While this is a state department at work, it almost certainly has the Department of Education breathing down its back, as do other state educational departments nationwide.

In North Carolina, when faced with difficult policy and legal issues such as these, we return to our number one rule of thumb, found in Article I, Section 35 of our state constitution:

“A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty.”

At its core, the opt out debate is about the role of the Executive in crafting extra-legislative policy. The Executive is charged with the carrying out of our nation's laws, and in doing so must interpret those laws to some extent. But to add entirely additional requirements or penalties to a law – like threatening states with the loss of federal education funding if students opt out of assessments – is far beyond the proper role of the Executive Branch. Doing so crosses the

threshold from enforcing duly authorized laws into adding completely separate requirements based on the Executive Branch's own policy preferences.

The problem of Executive overreach is one that greatly concerned the framers of our constitutional system. How does one provide for a branch of government that has physical military power, and yet not have that branch completely dominate the others? The framers had several responses to this question, the most important of which was to separate the spending power from the Executive in Article I, Section 8 of the United States Constitution:

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, and to pay the Debts and provide for the common Defense and general Welfare of the United States.

This power is given explicitly to Congress, and no other branch. The intent of this separation was to keep the Executive Branch in the business of enforcing laws, and leave decisions about framing law and policy to the people's representatives in Congress. Requiring the states to agree on policy in Congress, rather than allowing centralized policymaking from the Executive Branch, was one of the many ways that our Founders sought to maintain the separate states as "laboratories of experimentation" for a multitude of ideas.

Unfortunately, this system has broken down, and children nationwide are now paying the consequences. By threatening schools, parents, and students nationwide with penalties that have no root in the law, the Executive Branch is imposing its own policy preference in favor of standardized education and continuous testing – all this while insisting that these testing requirements are part of a "state-led" initiative. Such actions are far beyond the legitimate reach of the Executive Branch, and are certainly beyond what our Founders intended for our nation. If Congress does not step in and clarify that the executive is overreaching, then it may be left up to that third branch – the Courts – to put the Executive back in its proper role of enforcing, not creating, our nation's laws.

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An Underhanded Usurpation Of Popular Sovereignty – Guest Essayist: Nancy Salvato

Mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. Thomas Jefferson Declaration of Independence

Under the Articles of Confederation, the 13 states that made up the United States thought of themselves more as nation states loosely banding together as one country, for the purpose of defending their fragile sovereignty against foreign interests. Soon, a crisis later deemed Shay's Rebellion, emerged. Men who put themselves in harm's way fighting in the American Revolution had their farms confiscated and were thrown into debtor prisons for being unable to pay taxes issued by their government (ironically to pay for the long war). Farmers organized a

“resistance in ways similar to the American Revolutionary struggle.” Coined, “Shaysites” (named after their military leader), they were seen by some “as heroes in the direct tradition of the American Revolution, while many others saw them as dangerous rebels whose actions might topple the young experiment in republican government.” This emergency contributed to the determination that our country needed a national government with authority to enforce its power to raise money and defend itself against foreign and domestic threats.

Ensuing debate, however, made it clear that the states would not yield large amounts of control to a single executive who might abuse this privilege. Instead of creating a strong national government, the US Constitution establishes a federal system of government in which power is to be shared with the states. Furthermore, instead of having one executive with the power to legislate, enforce, and adjudicate, three branches of government with separated and shared powers were established to check and balance each other. Indeed, the Framers decided to divide the legislative branch into two chambers, the House and the Senate. Those elected to the Senate were intended to balance state against national interests. Members elected to the House of Representatives were supposed to represent the people on whose popular sovereignty our government’s power rests — thus the nomenclature “people’s house.” The origination clause provides that all money bills are to begin in the House. This is based on the long established practice that there should be “no taxation without representation.”

Sadly, due to the 17th Amendment, the Senate chamber no longer represents state interests due to the election of its members directly by the people rather than being chosen by individual state legislatures. Additionally, the House has abdicated its responsibility to the people by allowing the Senate to use smoke and mirrors to originate a money bill in its chamber. According to National Review’s George Will,

In October 2009, the House passed a bill that would have modified a tax credit for members of the armed forces and some other federal employees who were first-time home buyers — a bill that had nothing to do with health care. Two months later the Senate “amended” this bill by obliterating it. The Senate renamed it and completely erased its contents, replacing them with the ACA’s contents.

Because of Congress’ lack of public debate on the bill (another abdication of responsibility), the Affordable Care Act (ACA) was passed before members of either house, let alone the people, actually knew what was in it. In 2012, the court held that the “shared responsibility payment”, deemed a penalty by the ACA, is “a tax on the activity — actually, the nonactivity — of not purchasing insurance.”

While many await the court’s decision in *King v Burwell*, as to “whether federal-tax subsidies are available to people who purchase health insurance from exchanges operated by the federal government or instead whether such subsidies are available only from exchanges established by the states,” the question that begs to be heard is why a bill that doesn’t pass the smell test was passed by our congress in the first place.

To recap, in order to pass this landmark legislation, true debate was avoided, the exact legislation was unclear, and it originated in the Senate as an entirely different piece of legislation. Only an

apathetic, uneducated citizenry would allow those elected to the highest offices in the land, to either abdicate their responsibilities to uphold the rule of law or nefariously pursue the ends to justify these means in order to achieve universal health coverage. During the genesis of our nation, such hubris would have been met with outrage, perhaps even armed resistance. Today, we no longer recognize what would have been deemed tyranny by the founding generations. We idly watch as our popular sovereignty is surreptitiously destroyed.

Nancy Salvato's education career includes teaching students from pre-k to graduate school. She has also worked as an administrator in higher education. Her private sector efforts focus on the advancement of constitutional literacy. She attended the National Endowment for the Humanities's National Academy for Civics & Government, and is the author of "Keeping a Republic: An Argument for Sovereignty."

Undemocratic: How Unelected, Unaccountable Bureaucrats Are Stealing Your Liberty and Freedom (Part 3) – Guest Essayist: Jay Sekulow

In late May 2013, we'd seen enough. We filed a lawsuit, the largest in ACLJ history.²¹ Ultimately including forty-one conservative and pro-life organizations in twenty-two states, it represented a comprehensive attack on the IRS targeting scheme and laid out in detail the consequences of the IRS's misconduct. The ACLJ filed its case with the following understanding:

The IRS scheme had a dramatic impact on targeted groups, causing many to curtail lawful activities, expend considerable unnecessary funds, lose donor support, and devote countless hours of time responding to onerous and targeted IRS information requests that were outside the scope of legitimate inquiry.

Moreover:

Unlawful IRS targeting, despite public apologies, is ongoing. Multiple conservative organizations still have not received final determinations on their applications, are still receiving intrusive requests for information, and are still suffering financial harm. Some of these organizations, even after receiving tax-exempt status, have been subjected to continued monitoring by the IRS based on the same unlawful purposes for which their applications were originally targeted.²²

As we filed our case—and used the full resources of the ACLJ to inform Congress and the American people—the scandal exploded. There's an old Washington saying that the worst kinds of scandals are characterized by a “drip, drip, drip” of new information— with small new details emerging weekly or monthly until they slowly fill the news media with stories of wrongdoing.

But there was nothing “drip, drip, drip” about this scandal. It quickly became “flood, flood, flood.”

In fact, as of the time of this writing, it is no longer appropriate to refer simply to “the IRS targeting scandal.” The appropriate response is to ask, “Which IRS targeting scandal?”

They are legion.

The IRS Discloses Conservatives’ Confidential Information

The IRS has a terrible habit of disclosing confidential taxpayer information about conservatives and conservative groups.

In 2012, at the height of the presidential election season, the IRS claimed it “inadvertently” sent a copy of confidential documents to a liberal group called the Human Rights Campaign showing that an organization affiliated with Republican presidential candidate Mitt Romney had donated to a prominent social conservative organization.²³

This news—as well as the illegal disclosure—soon found its way onto the *Huffington Post*, where it was used to paint Romney as bigoted and further motivate President Obama’s leftist base to turn out to vote.

The conservative organization sued, and in 2014 the IRS settled the case, agreeing to pay the group fifty thousand dollars in actual damages for the disclosure, but the real damage had already been done to the Romney campaign and—more important—the public trust.²⁴

But even as the IRS settled it continued to maintain that the disclosure was a mistake.

A mistake? Really?

Here’s the liberal news organization ProPublica:

The same IRS office that deliberately targeted conservative groups applying for tax-exempt status in the run-up to the 2012 election released nine pending confidential applications of conservative groups to ProPublica late last year.

How did this happen?

In response to a request for the applications for 67 different nonprofits last November, the Cincinnati office of the IRS sent ProPublica applications or documentation for 31 groups. Nine of those applications had not yet been approved—meaning they were not supposed to be made public. (We [ProPublica] made six of those public, after redacting their financial information, deeming that they were newsworthy.) ²⁵

Once again, it’s important to emphasize the importance of these disclosures. Taxpayer confidentiality exists for a reason. Disclosure of confidential information leaves a taxpayer publicly exposed and vulnerable, and knowledge that their information is uniquely vulnerable to IRS “mistakes” can have a profound deterrent effect on the decision to even attempt to form a 501(c)(4) or to donate to a conservative nonprofit.

The IRS was following the rules with liberals, allowing their contributions to be secret. But with conservatives, the IRS was all too willing to break the rules, to expose conservative donations to the world. Their goal was obvious: to try to frighten conservatives into closing their wallets, depriving conservative groups of the money they needed to oppose the Left's agenda. But that's not all, of course.

The IRS Audits Conservatives

Even as it emerged that the IRS systematically targeted conservative organizations for additional scrutiny in the nonprofit application process, many conservatives were reporting a much more up-close and personal encounter with the revenue agency:

Despite [Lois Lerner's] assurances to the contrary, the IRS didn't destroy all of the donor lists scooped up in its tea party targeting [as they were ordered to do]—and a check of those lists reveals that the tax agency audited 10 percent of those donors, much higher than the audit rate for average Americans, House Republicans revealed Wednesday.²⁶

Ten percent isn't just a "much higher" audit rate. It's astronomically higher. In fact, Tea Party donors were "1000% more likely to be audited" than your average taxpayer.²⁷

And it wasn't just Tea Party donors; some of Republican nominee Mitt Romney's larger donors and other prominent conservatives faced their own IRS ordeals. Here's an ABC News report from May 2013:

Now Frank VanderSloot, an Idaho businessman who donated more than \$1 million to groups supporting Romney, told ABC News he believes he may have been targeted for an audit after his opposition to the Obama administration. So did Hal Scherz, a physician who started the group Docs4PatientCare to lobby against President Obama's health care initiative, and became a vocal critic of the president on cable news programs. Franklin Graham, the son of the evangelist Billy Graham, said he believes his father was a target of unusual IRS scrutiny as well, according to published reports Wednesday.²⁸

The IRS targeted not only Graham's evangelistic activities, but also Graham's humanitarian activities overseas, hitting Samaritan's Purse, a group known for—among other things—"Operation Christmas Child," a program that provides hope, gifts, and joy to desperately poor children around the globe.

Graham told Politico that groups founded by his famous father, the Billy Graham Evangelistic Association and the family's international humanitarian organization Samaritan's Purse, were both subjected to aggressive action by the IRS. In a letter to President Obama, which he shared with the news outlet, he wrote: "I do not believe that the IRS audit of our two organizations last year is a coincidence—or justifiable." ²⁹

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book *“UNDEMOCRATIC: How Unelected, Unaccountable Bureaucrats Are Stealing Your Liberty and Freedom”* is available now. He hosts *“Jay Sekulow Live”*—a daily radio show which is broadcast on more than 850 stations nationwide as well as Sirius/XM satellite radio. Follow him on Twitter @JaySekulow.

Excerpt provided by Howard Books, an imprint of Simon & Schuster.

Immigration Reform By Pen? – Guest Essayist: Tony Williams

The cliché that America is a “nation of immigrants” is true as successive waves of immigrants throughout its history came to this country for its freedoms and opportunity. The Statue of Liberty symbolically welcomes immigrants to America. Over the past 150 years, American immigration policy has alternated between restriction and liberalization. But, whatever vacillating nature of immigration laws, the unifying core was that constitutionalism generally guided the process of laws regarding immigration.

In the late nineteenth and early twentieth centuries, immigrants flooded America, especially the tens of millions from southeastern Europe, but also from Asia and Mexico. Xenophobia and nativism increased, and many native-born Americans sought to restrict immigration. The result was the 1882 Chinese Exclusion Act, which restricted all immigration from China; literacy tests, which finally passed during World War I when President Woodrow Wilson signed the bill unlike his predecessors who vetoed them; and the 1924 National Origins Act, which significantly reduced immigration by instituting quotas based on the 1890 Census before large numbers of southeastern Europeans arrived. These acts were discriminatory, but they followed ordinary constitutional processes.

The 1960s saw a liberalization of immigration laws. In 1965, Congress passed, and President Lyndon Johnson signed, the Immigration Act. The new law abolished the forty-year-old quota system and made immigration much easier by allowing people already in the United States to bring family members to the country. President Johnson strongly favored the measure but not even the very liberal author of the Great Society sought to act unilaterally.

During the 1980s, several million illegal immigrants came from Mexico which prompted calls for immigration reform. In 1986, President Ronald Reagan signed the Immigration Reform and Control Act which granted legal residence to all illegal immigrants living in the country as of 1982. A 1990 Immigration Act expanded the 1965 law and increased the numbers of immigrants allowed into the United States legally. The nature and consequences of illegal immigration led to a contentious debate throughout these decades, but responses were rooted in the rule of law whether or not they satisfied one constituency or another.

The debate over illegal immigration to America heated up in the 2000s. Conservatives railed against the problem of illegal immigration and argued that many reforms were “amnesty.” Liberals on the other hand pressed for reform that would make illegal immigrants citizens. Congress attempted to pass a “path to citizenship” several times, but it has still not passed. President Barack Obama, however, has decided to take action on his own to reform

immigration.

In 2012, President Obama signed an executive “directive” stating that young illegals would not be deported. In November, 2014, he signed an executive order that granted a reprieve from deportation to nearly half of the estimated 11 million illegal immigrants in the country to the great outrage of Republicans and dozens of states who sued the administration. So far, a federal district and appellate court have ruled the last executive order to be unconstitutional and blocked it.

Executive orders themselves are perfectly legal for a president to issue, and thousands have been signed. Moreover, some other presidents have taken action on immigration on their own without congressional approval, most notably Progressive President Theodore Roosevelt who made a “gentlemen’s agreement” with Japan to restrict immigration from that country. However, there is significant reaction against President Obama’s executive orders because many Americans believe that the people’s representatives should have a say in this important issue and preserve the system of checks and balances rather than leave the decision up to one person.

A few years ago, President Obama said, “We’re not just going to be waiting for legislation . . . I’ve got a pen And I can use that pen to sign executive orders and take executive actions and administrative actions that move the ball forward.” If there is an example of executive overreach that endangers constitutional principles as typified by this statement, President Obama’s actions on immigration is one.

Tony Williams is the author of five books including Washington and Hamilton: The Alliance that Forged America.

Undemocratic: How Unelected, Unaccountable Bureaucrats Are Stealing Your Liberty and Freedom (Part 4) – Guest Essayist: Jay Sekulow

The IRS seems to be replacing “tax collection” with “oppression and censorship” as a key part of its agency mission statement.

And what about existing 501(c)(4)s, the organizations that made it through the IRS targeting and were granted exemptions?

Surprise, surprise: the IRS follow-up audits exclusively targeted conservative groups.

Congressman Dave Camp, chairman of the powerful House Ways and Means Committee, said:

Additionally, we now know that the IRS targeted not only right-leaning applicants, but also right-leaning groups that were already operating as 501(c)(4)s. At Washington, DC’s direction, dozens of groups operating as 501(c)(4)s were flagged for IRS surveillance, including monitoring of the groups’ activities, websites and any other publicly available information. Of these groups, 83 percent were right-leaning. And of the groups the IRS selected for audit, 100 percent were right-leaning.³⁰

So, in summary, Tea Party donors were 1,000 percent more likely to be audited, Mitt Romney's largest donors faced their own IRS ordeals, prominent Christian groups like Franklin Graham's Samaritan's Purse faced "aggressive" IRS action, and 100 percent of 501(c)(4)s selected for follow-on audits were conservative.

But that's not all, of course.

The IRS Targets a Conservative Senator

In December 2012, Lois Lerner took a break from targeting Tea Party groups to suggest a different target, Iowa Republican senator Chuck Grassley.³¹

Lois Lerner and Senator Grassley were apparently invited to speak at the same event, and their invitations were swapped, with Lerner receiving Senator Grassley's. The senator's invitation indicated that the group hosting the event was apparently offering to pay the senator's wife to attend, and Lerner pounced, suggesting this was improper and that the IRS "refer to exam." Fortunately, cooler heads prevailed, and a highly inappropriate audit was avoided, but some context is required.

When Lerner targeted Senator Grassley, the target was hardly random. Senator Grassley had long monitored the IRS Exempt Organizations Division. He was doing what legislators should do, investigating whether the IRS was doing its job:

"This isn't random," said Dean Zerbe, a tax lawyer who helped Grassley investigate tax-exempt groups and reform the law governing them. "This is going after the senator most active in conducting serious reviews of charitable organizations as well as the IRS work in this area."

And:

Grassley was also one of a dozen senators who sent a letter to the IRS in March 2012 questioning whether Tea Party groups seeking tax-exempt status were being unfairly scrutinized.³²

In other words, Grassley didn't view the IRS as his ideological partner, but rather as a federal agency that required oversight. This, apparently, made him an enemy of the IRS, one subject to audit at Lois Lerner's whim.

But that's not all, of course.

The IRS Loves Planned Parenthood and Hates the Pro-Life Movement

In 2009, the Coalition for Life of Iowa, a small pro-life group, sought IRS approval for a tax exemption under Section 501(c)(3) of the tax code.

And what was the IRS's response?

It wanted the group to promise that it wouldn't protest or picket Planned Parenthood, the nation's largest abortion provider.³³ Here's the congressional testimony of Susan Martinek, the group's president:

"In June of 2009, Ms. Richards (no first name given) told me verbally that we needed to send in a letter with the entire board's signatures stating that under penalty of perjury we would not picket/protest or organize groups to picket/ protest outside of Planned Parenthood," Martinek said. "Upon receiving such a letter, she indicated that the IRS would allow our application to go through." 34

But that wasn't all. The IRS was concerned with much more than Planned Parenthood picketing, and—pulling a page from Lois Lerner's playbook when she investigated the Christian Coalition—demanded details of the Iowa Coalition for Life's prayer activities. Again, here's Martinek's testimony:

On June 22, 2009, IRS Agent Richards sent us additional written requests, as follows: "Please explain how all of your activities, including the prayer meetings held outside of Planned Parenthood are considered educational as defined under 501(c)(3). Organizations exempt under 501(c)(3) may present opinions with scientific or medical facts. Please explain in detail the activities at the prayer meetings. Also, please provide the percentage of time your organization spends on prayer groups as compared with the other activities of the organization. Please explain in detail the signs that are being held up outside of Planned Parenthood and explain how they are considered educational." 35

These are extraordinarily intrusive inquiries, with an astounding level of detail demanded about "prayer meetings," and an extraordinary level of protectiveness toward Planned Parenthood. Why is the IRS concerned only about signs held up outside Planned Parenthood? If it's truly concerned about the group's educational purpose, the signs about Planned Parenthood are no more or less relevant than the signs the group uses elsewhere.

Yet the Iowa Coalition for Life's ordeal was not unique. The IRS also targeted AMEN (short for "Abortion Must End Now"), an Arizona pro-life nonprofit, under Internal Revenue Procedure 86-43, an unconstitutionally vague procedure that allows biased IRS agents to subjectively determine whether an organization's educational materials are excessively "inflammatory" or "disparaging" or overly "emotional." ³⁶

In this case, the IRS targeted not just AMEN's pro-life materials, but also the name of the organization itself. Given the stunning level of vitriol and emotionalism that routinely pours forth from pro-abortion organizations, targeting a small pro-life group on these grounds was not only the height of irony, it was also unconstitutional viewpoint discrimination.

These attacks, where the IRS put its thumb on the scales of abortion—perhaps the most critical cultural, religious, and political argument of our time—demonstrates once again that employees of the IRS are less interested in impartial enforcement of tax laws than in using these tax laws to reward ideological friends and to punish ideological (and religious) foes.

But that's not all, of course.

The IRS Agrees to Monitor Free Speech in Churches

On July 21, 2014, the Freedom from Religion Foundation announced that it had reached a settlement with the IRS in response to a lawsuit filed in 2012. And what were the terms of the settlement? 37

The IRS agreed to “monitor churches and other houses of worship for electioneering.” (Electioneering is another word for taking an active part in a political campaign.)

In other words, the IRS—while under congressional investigation for its massive campaign of targeting, intimidation, and harassment of conservative groups—was at the same time *agreeing* with radical atheist organization that it would step up its investigations of free speech in churches and other tax-exempt organizations.

The IRS—while fighting tooth and nail our ACLJ lawsuit brought on behalf of conservative and pro-life groups the IRS targeted—was *agreeing* with arguably the nation's most litigious atheists that it wasn't doing enough to keep Christians in line, that it needed to expose churches to even greater scrutiny.

It is well-known that churches and other nonprofits (which are typically 501(c)(3) organizations) cannot—consistent with IRS rules—officially endorse candidates. This is a relatively modest limitation on free speech that comes along with a tax exemption, but even that relatively modest limit has suspect origins—dating back to Lyndon Johnson's attempts to prevent churches from mobilizing opposition to his early political career.

Prior to the so-called Johnson Amendment, churches enjoyed the full range of free speech rights. But the Freedom from Religion Foundation wants even *more* restrictions on religious speech, employing a very broad interpretation of IRS restrictions on political engagement that would essentially mean that religious officials not only couldn't endorse candidates, they couldn't even discuss key political issues from a biblical perspective from the pulpit, in Sunday school, on church websites, or through any other church resource.

Groups like the Freedom from Religion Foundation have advocated this view for so long that many churches and pastors are reluctant to discuss even the most basic of moral issues from the pulpit if they have political overtones. Let's take the fight for life, for example. Many Christians mistakenly believe that discussion of abortion from the pulpit is inherently “political” and thus unlawful. In reality, however, abortion is a moral issue, not just a political issue, and sharing a biblical perspective on that moral issue—and sharing truthful information about where individuals stand on life—is constitutionally protected speech.

But now that the IRS is required to “monitor” churches, temples, and houses of worship, will these institutions feel more or less free?

Should they trust the IRS to know the law and apply the law fairly?

And how, exactly, will it “monitor” them? By applying the same methods it applied to the Tea Party?

Once the congressional spotlight has shifted from the IRS scandals and the IRS once again feels a degree of freedom of action, I have little doubt that houses of worship will soon start to feel the presence of the tax man, through audits, investigations, subpoenas, and other forms of extraordinary scrutiny.

The IRS seems to be replacing “tax collection” with “oppression and censorship” as a key part of its agency mission statement.

But that’s not all, of course.

Jay Sekulow is Chief Counsel of the [American Center for Law and Justice \(ACLJ\)](#), which focuses on constitutional law. The ACLJ represents dozens of organizations that were unlawfully targeted by the IRS. Jay is a New York Times bestselling author. His latest book “UNDEMOCRATIC: How Unelected, Unaccountable Bureaucrats Are Stealing Your Liberty and Freedom” is available now. He hosts “Jay Sekulow Live”—a daily radio show which is broadcast on more than 850 stations nationwide as well as Sirius/XM satellite radio. Follow him on Twitter [@JaySekulow](#).

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How The Federalists Viewed Human Nature And Its Impact on The Resulting Government System In The United States of America (Part 1) – Guest Essayist: Amy Rofail

The founding fathers, particularly the writers of the *Federalist Papers*, were well versed in the classics, Greek literature, historical records of successes and failures of governments, and the political theorists of their era. The Founders’ views of human nature are the basis upon which they created a democratic republic such as they did in America. This paper will examine elements of the how the Founders’ viewed human nature, and how that view influenced the resulting mechanisms placed within the Constitutional government of the United States. This examination will focus on James Madison, Alexander Hamilton, *Federalist Papers* Numbers 6, 10, and 51, and other writings of Madison. In addition, the theories and writings of the era that influenced both Madison and other founding members of the federal government will be reviewed.

At the core of theorizing on governmental practices in the era that followed the Protestant Reformation was an increased emphasis, even respect, for the individual (Baradat 69). Thinkers and proponents of political theories, such as Locke, Hobbes, and Reasseau looked to the ancient Greeks and history for guidance on the nature of man and how government should be instituted to reflect that very nature. John Locke was particularly influential on the Founders and his ideas can be directly viewed in the preamble of the Declaration of Independence. It was Lockes’

struggle with the duality of man's nature (though he was optimistic about it) that the Founders, particularly the nationalists Madison, Hamilton, and Jay who penned the *Federalist Papers*, focused.

Locke's discussion of this issue is evident in his *Second Treatise of Government*. "Thus we are born free, as we are born rational; not that we have to exercise either." (34). Locke continues, "The freedom then of man, and liberty of acting according to his own will, is grounded on his having reason, which is able to instruct him in that law he is to govern himself by...to turn him loose to an unrestrained liberty, before he has reason to guide him, is not allowing him the privilege of his nature to be free" (34). Later in the treatise upon discussion of the act and role of government, Locke states, "For he that thinks absolute power purifies men's blood, and correct the baseness of human nature, need read but the history of this, or any other age, to be convinced of the contrary" (49). In addition to this recognition of the two seemingly opposite natures of man held at once, Locke illustrated this appeal to the Almighty when discussing men in the legislature: "Their power, in the utmost bounds of it, is limited to the public good of the society... Thus the law of nature stands as an eternal rule to all men, legislators as well as others...to the will of God, of which that is a declaration, and the fundamental law of nature being the preservation of mankind, no human sanction can be good, or valid against it" (71). Thus, Locke is exposing the dangers that the ill side of human nature has in encroaching on the natural law and the consent of the governed—all of which is bestowed upon humanity by God.

Democracy, for the Founders, seemed to be the logical and desired conclusion on how to utilize the consent of the governed, the social contract, and the notion of popular sovereignty. However, past historical failures of democracy let the writers of the *Federalist Papers*, and other nationalists and confederates, to seek to devise remedies for these failures while still maintaining the ideals of the social contract and popular sovereignty. In order to construct these remedies contained in the experiment of a federal, Constitutional America, the Founders assimilated the nature of man to expose, address, and attempt to solve the ills that plagued democracy. As well, they attempted to exalt or exploit the blessings humanity has received from its Creator.

The nature of man contained several components as revealed by our Founders' writings:

1. God created humanity and is subject to Him. All men are equal in value.
2. Man was born into a natural state, but being a social creature, strived to better his condition and thus formed alliances with others.
3. Man was born with certain God-given rights. Rights to life, liberty, and pursuit of happiness (property). Those rights are not an allowance to infringe on another's rights. Nor is the government allowed to separate one from his rights without a just cause.
4. Man can be selfish—even violent—in motives, but rational to solve problems with reason.
5. The most rational man can be overcome with passion or self-interest, and, either individually or collectively, oppress the rights of others.

6. Rational men can overcome passions and seek the greater good.

Entering the social contract, the consent to be governed is the compromise a free man makes to ensure and secure his God-given rights. Man always maintains the right to change or abolish the government when it no longer continues to serve said purpose.

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How The Federalists Viewed Human Nature And Its Impact on The Resulting Government System In The United States of America (Part 2) – Guest Essayist: Amy Rofail

The balance to solve the problems inherent in past democracies are addressed in the Federalist Papers. One topic that takes precedent is the idea of popular sovereignty and its dangers that can result in the tyranny of the majority. Whereas most Founders would agree that man is rational and capable of solving problems through reason, and that the will of the majority may be correct, this will is quite fallible. The recognition of this aspect of human nature lays the foundation upon which the Constitutionals will devise the mechanisms and safeguards within government to allow for popular sovereignty to rule, but tyranny of the majority to fail.

The very fact that these Federalist Papers were penned and published reveals a trust and confidence in the American population to deliberate and reason. In the very first of them, Federalist Paper 1, John Jay sets the tone by directly relating to the consensus of all three social contract theorists' (Hobbes, Locke and Rousseau) beliefs that men are rational and capable of solving problems with reason (Baradat 68). "My arguments will be open to all and may be judged by all" (Rossiter 30). Publius (pen name), in the next paragraph, lays out his topics of argument and rebuttal in a cogent, logical way.

Federalist Paper No. 6, written by Hamilton, recognizes the dangers of the motives of men as represented in republics and represented as individual kings. Hamilton reminds us in his

discussion responding to the advantages of the Confederation would create more harmony, "...would be to forget that men are ambitious, vindictive, and rapacious" (Rossiter 48). Hamilton shared Madison's distrust of human nature, but believed in people's ability to overcome said deficiencies with reason. This tone seems to contradict Thomas Jefferson's notion that the nature of man is generally good. Locke recognized the "dignity of human nature" (Baradat 71) whereas Hobbes distrusted it (69).

Thomas Jefferson, too, respected the dangers that lie within the hearts of men. In his first inaugural speech, Jefferson states, "All, too, will bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will, to be rightful, must be reasonable; that the minority possess their equal rights, which equal laws must protect, and to violate which would be oppression" (16).

Federalist Paper No. 10 is Madison's discourse on the dangers of the so-called factions that can oppress the minority's rights. Madison, like Plato, was weary of democracy and distrusted the masses in a crisis. Madison points out throughout his writings the crisis point of a society deteriorating the democracy into a dictatorship.

Madison so distrusted the masses that he devised and defended the notion of the checks and balances in government. If enough people with the same motive and ambition organized, this so-called faction as he called it could rule, via democratic institutions, to the detriment of the minority. By having a centralized government with divisions of power in the legislature, and the executive and judicial branches, the possibility of enough people creating that single-minded majority is lessened. The danger of the faction does not mean that a pluralistic viewpoint and mechanism cannot produce good for the community. Elected officials would be charged with rendering government for the good of the people, not the local, temporary will of the people. By dispersing power, even if an elected official was not the statesman of integrity representing the good of the people, the mechanism of diversifying power offered a safeguard against that potential tyranny.

Unlike Rousseau who thought the majority can do no wrong—that the general will of the people is always good by definition of it being the will of the majority—Madison examined too many historical examples to the contrary. People needed material well-being first in order to ponder and reason with rationality and with an outlook for the greater good. Crisis is what caused the rational to turn to the mob. By protecting individual rights, freedoms, and property, man can be free to exercise their thought for the greater good.

Madison's view of the American people can best be summed up by Robert Middlekauff in *The Glorious Cause*: "But underlying any successful constitutionalism there had to be a virtuous people. The Founders, especially Franklin, Madison, and Wilson, believed that the Convention must risk all, indeed risk the Revolution, by trusting the virtue of the American People" (653).

Madison viewed the risks involved in democracy of the tyranny of the majority to be less intense in America than in other nations or nation-states because of the size of its territory and diversity of population over that vast land made the possibility of any one faction dominating another less probable. The House of Representatives would be popularly elected. The removal of the Senate

from popular control separated the majority from the potential tyranny. The belief in popular sovereignty tempered with the fear of the majority's tyranny resulted in the remedied called the bicameral legislative branch.

These limits “protected the rights of the minority and of property, rights which had helped set the revolution process in motion in the 1760s” (Middlekauff 653).

Madison as well as other founders also recognized a Providence that seemed to guide humanity and the new nation. Jefferson reiterated this. Although Christianity or any particular religion was not inserted into the publication of the Federalist Papers nor the Convention itself, clearly an underlying virtue subject to an Almighty underscored the sentiments of most Americans and its founders. Religion was referenced as a commonality among men, but not a cure for its ills. “Yet the Constitution managed to capture some of the morality long common in American life and clearly present in the first days of the Revolution” (Middlekrau 652). As mentioned previously, Locke also held the assumption that men are accountable to a God who created them and the natural law.

The contradiction that Madison and other nationalists had to reconcile was the notion that popular sovereignty—the will of the people and self-government—was necessary and proper, but that the ills that could result (tyranny of the majority) needed advance remedies. The Constitution and the federal government it frames exalt the virtues and curtail the ills as best architected thus far in history. “It [the Constitution] aimed to thwart majoritarian tyranny, but it not deny that sovereignty resided in the people. Government should serve the people, and in the Constitution the delegates sought to create a framework which would make such service effective, though not at the cost of the oppression of the minority“(Middlekauff 652).

Moreover, “The delegates placed their trust in the people because they had no choice: a public had to found itself on the people. Their suspicions of popular power led to a preoccupation with restraints and curbs on the undue exercise of power by deedless majorities” (653). Popular sovereignty and the fear of the tyranny of the majority was therefore reconciled by an appeal to the people to approve the strong federal government under the Constitutional framework proposed.

James Madison penned a document called “Vices of the Political System of the United States” in April 1787. In this, he outlined his discontent with the Article of Confederations. This document reveals additional insight to the underlying beliefs Madison had regarding the nature of man and its ills when demonstrated in a democracy. Madison writes of the causes of injustice in the Laws of the States in two places: the Representative bodies and in the people themselves. Madison asserted that appointments to representative bodies have three motives: ambition, personal interest, and public good. He feared that the public good as perceived could be a mask for the first two. The people from whom the representative is elected are also a so-called danger in Madison's eyes. In this discussion, Madison further points out that the factions can still choose a representative that will not seek a greater good over the passions of the locality. Madison views that even reputation and religion cannot overcome this propensity for self-interest at the expense of others. These ideas in this document Madison penned are reiterated in *Federalist Papers Numbers 10 and 51*. By broadening the sphere of the republic, the dangers herein expressed are

lessened (Green 517-518). *Federalist Paper No. 51* examines the role of the checks and balances within the branches to protect the people by controlling each of the other branches and itself. The checks and balances protect the people from the government, and from each other, and the government from itself.

Therefore, this dual nature of man, a species created by God and guided by Providence, a species with innate capabilities such as reason and rationality; whose character traits include virtue, integrity and a quest for the common good; whose very nature is of equal value to all others and contains ambition and a desire for happiness and improvement. This nature also holds the ability to veer into darker traits such as brutish force to violate the rights of another via oppression to achieve self-interest. Reconciling these seemingly contradicting forces provides the premise on which the construction of the Constitution of a national federal government was framed. Democracy is both endowed by Nature as the right form of government, yet it is the very nature of the governed makes democracy dangerous. In this, then, is born the brilliant mechanisms of the Constitution that illuminate the will of the people and protect against its ills: Separation of power via an executive, legislative (bi-cameral) and judicial branch.

Championed by Madison, Hamilton, and Jay in the Federalist Papers and propelled by fellow founders such as Thomas Jefferson and Benjamin Franklin, this careful and meticulous examination of human nature brought forth a new paradigm on whose successes we enjoy liberty to this day.

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When Waters Aren't Waters At All: Executive Branch Over-Reaching And Federal Land Use Controls (Part 1) – Guest Essayist: Andrew Langer

How We Got Here

There is a truism when it comes to the power of the federal executive branch: over time, the power of that branch grows.

This can best be measured by the size and scope of the regulatory state. Every five years, the US Small Business Administration assesses the impact of federal regulations on the US economy. Every five years, the SBA's regulatory impact report shows growth. Even under President George W. Bush, the impact of regulations grew by 10% from 2000-2005. Under the Democratic-controlled House, and the first few years of the Obama administration, that number shot up to 35% growth of the regulatory state. Regulations cost the economy \$1.1 Trillion as of 2005. That number grew to \$1.75 Trillion by 2010, and assuming that the regulatory state grew at the same pace between 2010 and 2015 (not an unrealistic assumption giving the unrelenting growth in federal regulations under President Obama), when that report is released later this year we are looking at a regulatory state that will cost the American economy, directly, nearly \$2.4 trillion (or, another 50% more than the President's proposed budget)!

It is inexorable: mandates grow from pilot programs, to regulatory programs, to programs with civil penalties, to rules with criminal penalties, exacerbated by a legislative branch that passes laws that are vague, and open to wild interpretation by federal agencies.

One of the most troublesome examples of this is the growth in regulations that serve to bring land and water under greater federal control, and the severity of that control (severity being defined as the level of regulation of that parcel of land or water)—and the constant move to put lands under federal control under greater amounts of that control.

Control over land and water has always been a contentious issue. The founders never envisioned that the federal government would (or could) own or control the vast amounts of land under its jurisdiction today. Historically, if you look at states west of the Mississippi, the federal government has maintained increasing levels of control over land, with some states showing 70, 80, 90% federal ownership of land. History has also shown that the longer those lands remain under federal ownership, the greater the level of regulation of that land. Land that might have been used for grazing or timber production gets set aside as a monument. Land that gets set aside as a national monument gets turned into a recreation area. Land that gets turned into a recreation area becomes wilderness, and so on.

With each new designation, a new and more onerous set of rules applies—to the point that in places like Tombstone, AZ, their city was unable to fix an essential pipeline carrying the city's municipal water supply, because that pipeline crossed federal wilderness area.

Until the early 1970s, people east of the Mississippi were largely immune from this kind of control, but that all changed with the passage of two seminal environmental laws—the Endangered Species Act and the Clean Water Act. The ESA, contrary to popular belief, is less about species preservation and more about land use regulation (which is why, some scholars believe, so few species have ever come off of the endangered species list).

The Clean Water Act, meanwhile, was about keeping America's waterways clear. Not to be confused with the Safe Drinking Water Act, which passed several years after the CWA and sets standards from drinking water, run-off, etc, the CWA builds on earlier laws regulating the discharge of pollutants into "navigable waterways", and its passage in 1972 opened one of the

longest-running and most-contentious definitional debates in public policy history: just what does “navigable” mean.

As raised at a joint-hearing on potential changes to the definition of “Waters of the United States”, members of Congress on both sides of the aisle rightly point out that the CWA was passed in response to situations like the Cuyahoga River catching on fire. But this is where the agreement ended, as both sides presented a narrative regarding regulatory history, interpretation, and impacts that differed widely.

Here’s the fact: by every measure, America’s environment has improved and continues to improve, markedly. American Enterprise Institute scholar, Steven Hayward, in his annual publication of “Leading Environmental Indicators” charts the continued improvement of environmental health.

But it is also as true that the reach of the federal government into regulating waterways has moved at an ever-increasing rate.

Now, assuming that the motivations of the environmental community were about public health and welfare, the questions we would be asking ourselves (now that the CWA is more than 22 years old) are: “how clean is clean?” and “how much are we willing to spend to gain marginal benefits in environmental health and safety?” These are the fundamental scientific questions, determining whether or not a policy is sensible, both from a public health and a public policy standpoint.

But because the left has always played a game of “sleight of hand” on these matters, the debate is really over land use and control.

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When Waters Aren’t Waters At All: Executive Branch Over-Reaching And Federal Land Use Controls (Part 2) – Guest Essayist: Andrew Langer

Waters, Regulation, And Political “Sleight Of Hand”

At its most-basic level, sleight-of-hand is the art of performed misdirection. A magician gets an audience to focus their attention on something shiny he is holding in one hand, distracting you from the trick he is attempting behind his back. If successful, the audience is fooled into thinking that something magical has happened, completely unaware of what tricks the illusionist has engineered to accomplish his feat. Woe be unto the illusionist who can’t complete his feat without exposing the artifices used to achieve it, or, worse, who public fails at their misdirection.

So it has been with this administration. Time and time again, the administration has tried to put shiny objects in front of the American people, to distract them from whatever illusory policy goal they are trying to achieve. That, or they have attempted to create a bizarre surreality—claiming

that whatever reality the world might be facing simply isn't real: the crisis in the Ukraine can be solved with diplomacy; doubling our vigilance can stop ISIS; the Keystone Pipeline won't create jobs; and so on.

To hear the administration claim it, their controversial rulemaking on "wetlands" wasn't controversial at all, that the hundreds of thousands of comments were all in support of the rule, that it would clarify, not confuse, and that it would benefit America's small businesses, not harm them.

The biggest lie was this one: that the rulemaking would not increase the federal government's "jurisdiction" over private property. But this claim flies in the face of the very core goal of America's environmental organizations: to put as much land and water as possible under the regulatory control of the federal government.

For many years, the discussion was over what "navigable" really meant when the CWA was passed. For rational Americans, navigable always meant rivers like the Cuyahoga in Ohio, the Hudson in New York, the Anacostia in DC. Rivers that you could, literally, navigate.

But over the many decades of the CWA, that definition was stretched so thinly, that a dry patch of sand in the high desert of Nevada was considered a "navigable waterway", subject to the jurisdiction of the CWA. As one might imagine, this marginal interpretation of the CWA's jurisdiction led to numerous lawsuits, with the Supreme Court ultimately deciding that there were, in fact, limits to the federal government's authority over wetlands.

The importance of this cannot be overstated. The High Court, in a trio of cases, affirmed the principles of federalism and limitations of centralized power—forcing the EPA, the Army Corps of Engineers, and the environmental movement to rethink their approach to wetlands control. Navigable, essentially, meant navigable—or, at the very least, it didn't mean marginal, isolated wetlands.

The left's answer to this confusion? To drop the term "navigable" from clean water parlance entirely! It was a brilliantly devious answer to a court finding that there were limits to federal power, and it underscored, again, that the left was less-interested in the rule of law and sound public policy and more interested in pursuing its own agenda of land-use control.

From a legislative perspective, it simply didn't work. Attempts to remove "navigable" from statute failed, and the administration was left with their go-to option: using the rulemaking process. Which is what led to this week's hearing.

One thing needs to be made clear: this rulemaking was done in response to a series of Supreme Court decisions that placed a limit on the left's ability to put as much land as possible in federal control. It limited their ability, *it did not limit or change their desire!*

But the left cannot come out and say this—their narrative has to be that they are, for whatever reason, curtailing their efforts to intrude on land use decisions that are out of their jurisdiction. While many members of Congress, those interested in protecting both property

rights *and* the environment, were willing to call out the EPA administrator and the head of the Army Corps of Engineers, none were so insightful as Sen. Mike Crapo (R-ID), who said this:

“As I see it, where the agency is heading right now... it appears that agency has flipped the Supreme Court,” employing the rationale of those on the court advocating for an expansive role of federal regulatory authority.

Crapo hit the nail on the head. The administration is attempting *yet another* public policy sleight of hand! They are claiming to be acting in accordance with Supreme Court caselaw, yet the reality is the opposite! What they are trying to do is create an entirely new way of gaining control over more amounts of land—insidious and devious and entirely unethical.

Rules like this have a real world impact. Placing land under regulatory control, requiring extensive permitting, has a cost on small businesses and working families. It keeps our economy mired in doldrums and keeps people unemployed. EPA ought to scrap this proposal, heed the advice of the Small Business administration and study the impact on the nation’s small businesses, and start again.

Most importantly, they need to be honest with the American people about what they are trying to do.

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Stopping The Usurpation Of Advice And Consent – Guest Essayist: Scot Faulkner

June 28, 2014 is an historic day in thwarting Presidential over-reach. On that day the U.S. Supreme Court unanimously ruled President Obama’s recess appointments unconstitutional. *NLRB versus Noel Canning, ET AL* was a rare instance when the Judicial Branch acted as referee and reset the balance of power between the Executive and Legislative Branches.

The case centered on Noel Canning challenging a February 8, 2012 National Labor Relations Board (NLRB) decision on the grounds that its quorum only existed with the presence of invalid recess appointments. Noel Canning’s attorney argued that Obama’s ap-pointments were invalid because the 3-day adjournment between Congressional sessions was not long enough to trigger the Recess Ap-pointments Clause.

On January 25, 2013, a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit struck the first blow against President Obama’s over reach by unanimously agreeing with Canning and ruling that the three recess appointments to the NLRB on January 4, 2012 were unconstitutional.

The Appeals Court asserted that the circumstance that would allow a President to make “Recess Appointments” under Article II, Section 2 of the U.S. Constitution did not exist, because the Congress was in Pro Forma Session, not in a formal recess.

The Constitutional Convention of 1787 established two coequal chambers within the Legislative Branch. One aspect of this balance is that:

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting. [Article 1, Section 5, Clause 4]

The formal end of a Congress is when the Legislative Branch adjourns “Sine Die” (from the Latin “without day”) meaning “without assigning a day for a further meeting or hearing”. The Twentieth Amendment to the Constitution also sets a formal start and end time for each Congress.

The most complex consequence of Clause 4 relates to when Congress takes a recess and when it adjourns. A recess is a temporary halt to activity on the floor. Everything stops, and when the recess ends, the chamber resumes from where it left off. A recess might last 10 minutes or it might last weeks. The length of time does not matter. An adjournment is a formal end to business in the chamber, and upon return the chamber does not resume from where it left off. Just like a recess an adjournment can be for one minute or for three weeks.

Any formal break in Legislative Branch activity opens the door for a President to take certain actions. This includes making appointments which require Senate confirmation. Congressional leaders of both parties have devised ways to avoid inadvertently unleashing Presidential activism.

The Congress can take a break from legislative activity, and still avoid a formal recess or adjournment, by meeting in a “pro forma” session. Pro forma means “for the sake of formality”. In recent years pro forma sessions have prevented Presidents from making recess appointments, and in the case of President George W. Bush in 2008, deprived him calling a special session to reauthorize the Protect America Act and the Foreign Intelligence Surveillance Act.

As long as a Member convenes either the House or Senate to formally open and close a session there is no recess or adjournment. Members sometimes compete to see how fast they can conduct a pro forma session. The record is currently held by Senator Jack Reed of Rhode Island who completed the task in 12 seconds.

Obama’s January 2012 appointments were designed to dramatically expand his appointment authority by asserting his recess-appointment power as a “safety valve” against Senatorial “intransigence.” [1]

The Supreme Court unanimously declared the President lacked the authority to make those appointments. [2]

Justice Breyer delivered the opinion of the Court and quoted from the Federal Papers, “the need to secure Senate approval provides “an excellent check upon a spirit of favoritism in the President, and would tend greatly to preventing the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.” [3]

Breyer further wrote, “If a Senate recess is so short that it does not require the consent of the House, it is too short to trigger the Recess Appointments Clause. See Art. I, §5, cl. 4. And a recess lasting less than 10 days is presumptively too short as well”. [4] He dismissed the counter arguments of Obama’s Solicitor General as not, “either legally or practically appropriate”. [5]

Justice Scalia wrote a Concurrence that went further in assailing Obama’s attempt to nullify the Senate’s role in the appointment process [6]. Scalia exposed Obama’s “untenably broad interpretation” of Presidential power. [7] He also defined the Senate’s role in advice and consent on Presidential appointments “as a critical protection against “despotism,” *Freytag*, 501 U. S., at 883”. [8]

The Concurrent Opinion was unprecedented in raising serious concerns over President Obama’s “aggrandizing the Presidency beyond its constitutional bounds and undermining respect for the separation of powers”. [9] It also challenged Obama’s rationale, “I can conceive of no sane constitutional theory...requiring us to defer to the views of the Executive Branch”. [10]

Justices Scalia, Thomas, Roberts, and Alito stood firm against Obama’s power grab by embracing the founding principles of America, “the limitation upon the President’s appointment power is there not for the benefit of the Senate, but for the protection of the people”. [11]

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NOTES:

[1] Tr. of Oral Arg. 21; page 74. http://www.supremecourt.gov/opinions/13pdf/12-1281_mc8p.pdf

[2] NLRB versus Noel Canning, ET AL; No. 12–1281. Argued January 13, 2014—Decided June 26, 2014; 573 U. S. ____ (2014); 705 F. 3d 490, affirmed; Page 41.

[3] Alexander Hamilton, *The Federalist* No. 76, p. 513 (J. Cooke ed. 1961).

[4] NLRB versus Noel Canning, ET AL; No. 12–1281. 573 U. S. ____ (2014); page 26.

[5] *Ibid*; page 43.

[6] *Ibid*; page 60. Scalia joined by Justices Thomas, Roberts, and Alito.

[7] *Ibid*; page 61.

[8] *Ibid*; page 70.

[9] *Ibid*; page 108.

[10] *Ibid*; page 106.

[11] *Ibid*; page 107.

Why Are TPA And TPP Being Referred To As Obamatrade? – Guest Essayist: Nancy Salvato

In an article by Connor Wolf called *This Is The Difference Between TPP And TPA (Hint: They Are Not The Same Thing)*, he explains that these two bills are linked together because Trade Promotion Authority (TPA) is a means to fast track passage of the Trans-Pacific Partnership (TPP). I am confused by this line of reasoning because as a stand-alone bill, TPA is intended to provide transparency to all trade negotiations by soliciting public and congressional input throughout the process, however, TPP as a stand-alone bill, is behemoth and most of the information to which the public has access has been leaked. Furthermore, it was negotiated behind closed doors. According to the verbiage of TPA, if TPP is not negotiated using TPA guidelines, the fast track option is negated. So why do news outlets and a wide range of legislators portray these two bills disingenuously? Bundling the TPA and TPP as one idea called Obamatrade is no different than bundling immigration reform and border security, which are two separate issues. One is about drug cartels and terrorism and the other is about how we manage people who want to immigrate to the United States.

Challenges TPA hopes to remedy throughout the negotiating process and in resulting trade agreements have parallels to challenges facing the US and its allies when agreeing to make war on the foreign stage. While one president may assure allies that US troops will assist in gaining and maintaining freedom, i.e., Iraq, a new administration or congress may change the terms, leaving a foreign country abandoned, with the understanding that the US cannot be relied upon to meet its agreed upon obligations. When negotiating foreign trade agreements, this same realization comes into play when negotiations that took place in good faith are undermined by a new administration or congress that change the terms. TPA hopes to create a set of consistent negotiating objectives when hammering out trade agreements, allowing agreements to transcend administrations and congresses.

The following excerpts from a letter written to President Obama from Sen. Jeff Sessions (R, AL) would alarm any person who understands the division of powers and checks and balances built into our rule of law. Posted in [Exclusive–Sessions to Obama: Why Are You Keeping Obama Trade’s New Global Governance Secret?](#) Sessions explains,

“Under fast-track, Congress transfers its authority to the executive and agrees to give up several of its most basic powers.”

“These concessions include: the power to write legislation, the power to amend legislation, the power to fully consider legislation on the floor, the power to keep debate open until Senate cloture is invoked, and the constitutional requirement that treaties receive a two-thirds vote.”

Understanding that Senators Marco Rubio, Ted Cruz and Representative Paul Ryan have gotten behind TPA, it would be short sighted and irresponsible not to probe further into why they aren’t exposing these violations of our rule of law.

According to The Hill’s Daniel Horowitz in [TPA’s ‘Whoa, if true’ moment](#), Cruz and Ryan have explained, “most of the content of the bill is actually requirements on the executive branch

to disclose information to Congress and consult with Congress on the negotiations.” Congress would be informed on the front end, as opposed to debating and making changes to what was already negotiated. This is important because as Cato Institute’s Scott Lincicome and K. William Watson explain in *Don’t Drink the Obamatrade Snake Oil*,

Although trade agreements provide a mechanism for overcoming political opposition to free trade, they also create new political problems of their own, most of which stem from the inherent conflict in the U.S. Constitution between the power granted to Congress to “regulate commerce with foreign nations” (Article I, Section 8) and that granted to the president to negotiate treaties (Article II, Section 2) and otherwise act as the “face” of U.S. international relations. In short, the executive branch is authorized to negotiate trade agreements that escape much of the legislative sausage-making that goes in Washington, but, consistent with the Constitution, any such deals still require congressional approval—a process that could alter the agreement’s terms via congressional amendments intended to appease influential constituents. The possibility that, after years of negotiations, an unfettered Congress could add last-minute demands to an FTA (or eliminate its biggest benefits) discourages all but the most eager U.S. trading partners to sign on to any such deal.

TPA, also known as “fast track,” was designed to fix this problem. TPA is an arrangement between the U.S. executive and legislative branches, under which Congress agrees to hold a timely, up-or-down vote (i.e., no amendments) on future trade agreements in exchange for the president agreeing to follow certain negotiating objectives set by Congress and to consult with the legislative branch before, during, and after FTA negotiations. In essence, Congress agrees to streamline the approval process as long as the president negotiates agreements that it likes.

For a really good argument for fast tracking, watch the video that can be found here:

Here’s why the TPP is such a big deal 03:24

K. William Watson explains in *What’s Really in the New Trade Promotion Authority Bill?* TPA will actually bring more transparency to the negotiating process.

The current bill would require the administration to provide public summaries of its negotiating positions. This will give the public something concrete to debate without having to resort to conspiracy claims or wild theories. It will also help everyone see more clearly how negotiators intend to implement the negotiating objectives of TPA.

It will also require that every member of Congress has access to the full text of the negotiations from beginning to end.

If TPA actually does what it is intended, a bill like TPP could not possibly be held to an up or down vote because it would not have been negotiated using the processes as outlined. Or could it? This administration passed Obamacare, which is a tax; they wanted comprehensive immigration reform and secure borders yet they openly courted Latin American countries to bring their kids to the border; they said they’d be the most transparent administration but there has been a dramatic lack of transparency, one must pass the bill before knowing what’s in it.

Perhaps what it all boils down to is what Rick Helfenbein writes about in Trade promotion authority, a Washington drama

There are other conservatives like Rep. Walter Jones (R-N.C.) who remain adamantly opposed to giving the president (presumed) additional authority. Jones said of Obama and TPA: “Given his record, I am astonished that some of my colleagues are so eager to fork over even more of their constitutional authority to the [p]resident for him to abuse.”

While this article addresses the issue of TPA, it doesn’t begin to address the arguments against TPP, for example The Guardian’s C Robert Gibson and Taylor Channing’s conclusion that, “Fast-tracking the TPP, meaning its passage through Congress without having its contents available for debate or amendments, was only possible after lots of corporate money exchanged hands with senators.” That is an article for another day.

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Undemocratic: How Unelected, Unaccountable Bureaucrats Are Stealing Your Liberty and Freedom (Part 5) – Guest Essayist: Jay Sekulow

Imagine you approach a Hollywood executive with the following script idea: A powerful federal agency goes rogue. It targets political opponents with extraordinary investigations, targets opponents for audits, tries to throw opponents in jail, targets politicians who try to investigate its wrongdoing, and even attempts to monitor the prayers of the faithful. Then, just when investigators close in on the wrongdoers, they suddenly disclose that they’ve “lost” all the relevant evidence. The movie would never be made. Why not? Because it’s too cartoonish, too absurd to be believable. But in the modern IRS, truth is truly stranger than fiction.

The IRS Tried to Criminalize Conservative Speech

In perhaps the most ominous development of all, the IRS was not content with merely delaying and harassing Tea Parties and other conservative groups, not content with auditing conservative individuals, and certainly not content with investigating the prayer meetings of pro-life groups. To truly advance the Obama administration’s agenda, the IRS needed to do more.

It needed criminal prosecutions—even if there was no evidence of a crime.

In early 2014, Judicial Watch uncovered a key email exchange between Lois Lerner and Nikole Flax, the former IRS commissioner’s chief of staff.³⁸

To be clear, the words you’re about to read were written just days before Lois Lerner offered her insincere, misleading apology for targeting the Tea Party:

I got a call today from Richard Pilger Director Elections Crimes Branch at DOJ. I know him from contacts from my days there. He wanted to know who at IRS the DOJ folks could talk to about [Rhode Island Democrat] Sen. Whitehouse idea at the hearing that DOJ could piece together false statement cases about applicants who “lied” on their 1024s—saying they weren’t planning on doing political activity, and then turning around and making large visible political expenditures. DOJ is feeling like it needs to respond, but want to talk to the right folks at IRS to see whether there are impediments from our side and what, if any damage this might do to IRS programs.

I told him that sounded like we might need several folks from IRS. I am out of town all next week, so wanted to reach out and see who you think would be right for such a meeting and also hand this off to Nan as contact person if things need to happen while I am gone— 39

Here was Ms. Flax’s response:

I think we should do it—also need to include CI, which we can help coordinate. Also, we need to reach out to FEC. Does it make sense to consider including them in this or keep it separate? 40

For those not familiar with the bureaucratic language of these emails, Lerner is telling Flax that she spoke with the Department of Justice about prosecuting conservative nonprofits, but not because there were any credible complaints of wrongdoing but only because a liberal senator (Sheldon Whitehouse of Rhode Island) was demanding IRS action.

The phrase “piece together” is government-speak for “make up.” They were going to make up cases against conservatives—send people to jail because the IRS hated their speech. And rather than immediately condemn this idea, Flax endorsed it and even suggested expanding it to the Federal Election Commission. The earlier reference to “CI” is the Criminal Investigative Division. So there you have it: the real lawbreakers are the IRS and DOJ, which have conspired to deny our clients’ constitutionally protected rights.

Simply put, this is the kind of behavior that one expects from the bad old days of East German politics or contemporary Cuba, where the government regime finds ways to concoct prosecutions against its opponents.

This was an unparalleled, unprecedented attempt to stifle political expression through the use of grand jury indictments and prosecutions without a shred of evidence. Fortunately, they were caught before they could bring any charges.

Lest anyone think this was simply an isolated exchange—just a few bureaucrats harmlessly brainstorming—it’s clear that the IRS had long been committed to taking criminal action against the Tea Party.

In October 2010 the IRS sent a whopping total of 1.1 million pages of taxpayer files to the FBI in advance of a meeting to discuss potential criminal prosecutions against nonprofit groups.⁴¹ According to *National Review*, many of these documents likely contained confidential taxpayer information. This means the IRS was not only attempting to prosecute dissent; it was

violating its own governing statutes and regulations to do so.

It's hard to overstate the gravity of these revelations. Few things are more chilling than the prospect of federal criminal prosecution, and facing such a prospect for merely forming a group that, say, opposes ObamaCare or abortion is an unspeakable violation of the letter and spirit of the Constitution.

It's un-American.

But that's not all, of course.

The IRS "Loses" the Evidence

Imagine you approach a Hollywood executive with the following script idea: A powerful federal agency goes rogue. It targets political opponents with extraordinary investigations, targets opponents for audits, tries to throw opponents in jail, targets politicians who try to investigate its wrongdoing, and even attempts to monitor the prayers of the faithful. Then, just when investigators close in on the wrongdoers, they suddenly disclose that they've "lost" all the relevant evidence.

The movie would never be made. Why not? Because it's too cartoonish, too absurd to be believable.

But in the modern IRS, truth is truly stranger than fiction.

On Friday, June 13, 2014, the House Ways and Means Committee reported that the IRS "lost" emails from Lois Lerner, the top IRS official at the center of the targeting of conservative groups.⁴²

Yes, "lost."

Incredibly, the supposedly "lost" emails are from "January 2009–April 2011"—the exact heart of the IRS targeting scandal, when hundreds of conservative groups applied for tax-exempt status and were intentionally slow-rolled as intrusive questionnaires were developed, when Lois Lerner was attempting to jump-start frivolous criminal investigations, when the IRS was working from top to bottom to crush the conservative movement.

Even more conveniently, all emails during the period "to and from" Lerner involving "outside agencies or groups, such as the White House, Treasury, Department of Justice, FEC, or Democrat offices" are gone—because of an alleged "computer crash."

A computer crash.

Never mind, of course, that government emails are not housed on individual hard drives but instead on the IRS exchange servers. Never mind that the exchange servers were backed up every six months. The emails were gone.

Vanished.

Even worse, the IRS discovered this alleged loss only weeks after promising Congress it would produce all of Lois Lerner's emails, even after it allegedly knew the emails were gone.

House Ways and Means chairman Dave Camp was justifiably outraged:

The fact that I am just learning about this, over a year into the investigation, is completely unacceptable and now calls into question the credibility of the IRS's response to Congressional inquiries. There needs to be an immediate investigation and forensic audit by Department of Justice as well as the Inspector General.

Just a short time ago, [IRS] Commissioner [John] Koskinen promised to produce all Lerner documents. It appears now that was an empty promise. Frankly, these are the critical years of the targeting of conservative groups that could explain who knew what when, and what, if any, coordination there was between agencies. Instead, because of this loss of documents, we are conveniently left to believe that Lois Lerner acted alone. This failure of the IRS requires the White House, which promised to get to the bottom of this, to do an Administration-wide search and production of any emails to or from Lois Lerner. The Administration has repeatedly referred us back to the IRS for production of materials. It is clear that is wholly insufficient when it comes to determining the full scope of the violation of taxpayer rights.⁴³

Jay Sekulow is Chief Counsel of the [American Center for Law and Justice](#) (ACLJ), which focuses on constitutional law. The ACLJ represents dozens of organizations that were unlawfully targeted by the IRS. Jay is a New York Times bestselling author. His latest book "UNDEMOCRATIC: How Unelected, Unaccountable Bureaucrats Are Stealing Your Liberty and Freedom" is available now. He hosts "Jay Sekulow Live"—a daily radio show which is broadcast on more than 850 stations nationwide as well as Sirius/XM satellite radio. Follow him on Twitter [@JaySekulow](#).

Excerpt provided by Howard Books, an imprint of Simon & Schuster.

Undemocratic: How Unelected, Unaccountable Bureaucrats Are Stealing Your Liberty and Freedom (Part 6) – Guest Essayist: Jay Sekulow

During the Watergate scandal, the press went into a veritable feeding frenzy when the Nixon White House reported that slightly more than eighteen minutes of tape recordings of a key conversation between President Richard Nixon and his chief of staff, H. R. Haldeman, were erased. The Nixon White House claimed it was an accident. This erasure contributed immeasurably to the perception that the president was corrupt and helped bring down a presidency that only two years earlier had won reelection in a historic landslide. (Ironically enough, one of the articles of impeachment ⁵¹ against Richard Nixon cited his attempts to use the IRS against his political enemies, attempts that were insignificant compared to the vast scope of actual IRS wrongdoing during the Obama administration.) Fast-forward to 2014, with the IRS facing allegations of wrong- doing that absolutely dwarfed in scale and scope any of the

allegations against the Nixon administration, and it “lost” far, far more evidence than a mere eighteen-minute conversation.

Then it got worse. Much worse.

Days later, the IRS informed Congress that it lost emails from at least six more IRS officials, including Nikole Flax, the chief of staff to the former commissioner, and the very same individual who suggested roping the FEC into the IRS and DOJ’s scheme to launch made-up (excuse me, “pieced together”) prosecutions of conservative nonprofits.⁴⁴

Computers are crashing all over the IRS.

This was astounding behavior from an agency that demands taxpayers—to paraphrase Comedy Central’s Jon Stewart—to become virtual “hoarders” of receipts and other records.

This from an agency that requires taxpayers to bear the burden of proof of their own expenses when it launches an audit, a departure from the constitutional norm that typically requires the government to bear the burden of proof when it accuses citizens of wrongdoing.

An ACLJ post from the week when this phase of the scandal broke got it exactly right: “The IRS claims that it stores voluminous amounts of email, yet just the important ones from what may be the largest IRS scandal in history seem to disappear.”⁴⁵

In response, the IRS touted its data-keeping prowess:

*The IRS email system runs on Microsoft Outlook. Each of the Outlook email servers are located at one of three IRS data centers. Approximately 170 terabytes of email (178,000,000 megabytes, representing **literally hundreds of millions of emails**) are currently stored on those servers. For disaster recovery purposes, the IRS does a daily back-up of its email servers. The daily back-up provides a snapshot of the contents of all email boxes as of the date and time of the backup.⁴⁶*

Somehow, out of “170 terabytes of email” stored on its servers, the IRS managed to lose exactly the emails Congress most wanted to see. How convenient.

On July 9, 2014, the scandal expanded from emails to “OCS”—short for Microsoft Office Communications Server, the IRS’s internal instant messenger service. The House Oversight Committee released emails showing that a mere twelve days after the IRS learned that the Treasury inspector general was going to blow the lid off the Tea Party targeting scandal, Lois Lerner emailed an IRS IT professional asking this:

I had a question today about OCS [Microsoft Office Communications Server]. I was cautioning folks about email and how we have several occasions where Congress has asked for emails and there has been an electronic search for responsive emails—so we need to be cautious about what we say in emails. Someone asked if OCS conversations were also searchable—I don’t know, but told them I would get back to them. Do you know? ⁴⁷

Here was the response:

No, the IRS does not routinely save chat communications— unless employees intentionally take steps to preserve their conversation. These chat communications are not saved— and this is critical—despite the fact that “the functionality exists within the software.” 48

Let’s be clear: This means that the IRS had the ability to save its internal “chat” communications, but chose not to do so. The “functionality” existed, but the IRS did not choose to use it. Lois Lerner’s reply?

“Perfect.” 49

Yes, for Lerner it was perfect—the exact answer she needed to hear. She could “caution” her team to be careful in emails, she could “crash” her computer, and then she could still—at least for the time being—speak internally on a communications system that the IRS was choosing not to save.

Keep in mind also that Lerner was urging “caution” in response to knowledge that Congress would be performing its constitutional oversight responsibility. Unelected bureaucrats should not be “cautious” in dealing with the American people’s elected representatives; they should be transparent.

These revelations, taken together, provided a road map for other federal agencies to suppress or “lose” their own records of emails with Lois Lerner. And, yes, like clockwork the White House came forward days later to claim that it had done a comprehensive search of its own computer records and no one had ever emailed Lois Lerner.

So, here’s the timeline: the IRS takes a year to tell Congress it “lost” the key Lerner emails, while it took the White House just days to report that no Lois Lerner emails exist.

But what about emails with chief of staff Nikole Flax? She visited the White House thirty-one times, and some segments of her emails were lost as well.⁵⁰ Did the White House thoroughly search for her communications?

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attempts to use the IRS against his political enemies, attempts that were insignificant compared to the vast scope of actual IRS wrongdoing during the Obama administration.) Fast-forward to 2014, with the IRS facing allegations of wrongdoing that absolutely dwarfed in scale and scope any of the allegations against the Nixon administration, and it “lost” far, far more evidence than a mere eighteen-minute conversation.

Yet aside from the indispensable conservative media, the mainstream media yawned, appearing to take at face value that, well, computers crash.

In 1974, dogged investigators hounded the president of the United States.

In 2014, aggrieved conservatives—victimized by a staggering amount of wrongdoing—could only turn to a Department of Justice so beset with its own partisan bias that it earns itself two entire chapters of this book, chapters that can expose only a small fraction of the department’s recent wrongdoing.

And how did the Department of Justice respond to the IRS wrongdoing? By appointing a dedicated partisan and Obama donor to “lead” the DOJ’s investigation of the IRS.⁵²

Don’t forget that this is the same DOJ that was trying—just days before the attorney general ordered it to “investigate” the IRS—to “piece together” prosecutions of conservatives.

The conflict of interest was obvious. And it was left obviously unaddressed, and it still has not been addressed as this book goes to print.

A single chapter in a book cannot possibly do justice to the full extent of IRS malice as it assaulted President Obama’s political opponents. Those familiar with the scandal will read this book and immediately think of multiple additional incidents.

But the purpose of this book is not to provide the final word on the IRS’s political corruption. Indeed, even as I write, litigation is ongoing—litigation that is revealing new facts every day. The purpose of this book is to show—agency by agency—how our federal bureaucracy is corrupting the rule of law, threatening our democracy, and acting with unchecked arrogance and malice.

And lest you think the arrogance and malice are confined to the government’s treatment of conservatives, think again.

I’m not even finished talking about the IRS.

Jay Sekulow is Chief Counsel of the [American Center for Law and Justice](#) (ACLJ), which focuses on constitutional law. The ACLJ represents dozens of organizations that were unlawfully targeted by the IRS. Jay is a New York Times bestselling author. His latest book “UNDEMOCRATIC: How Unelected, Unaccountable Bureaucrats Are Stealing Your Liberty and Freedom” is available now. He hosts “Jay Sekulow Live”—a daily radio show which is broadcast on more than 850 stations nationwide as well as Sirius/XM satellite radio. Follow

him on Twitter @JaySekulow.

Excerpt provided by Howard Books, an imprint of Simon & Schuster.

Fear Of An Overly Powerful Executive? As American As Apple Pie – Guest Essayist: James D. Best

Americans abhor politicians who gather up inordinate powers. At least, that used to be the case. From our Revolution forward, Americans remained wary of any officeholder who tried to maneuver around constitutional limits. This was especially true if the trespasser happened to be a president.

Our apprehensions about an overly powerful executive go all the way back to the Founding. The constitutional framers feared a dominant executive because they knew concentrated power threatened liberty. The more authority an executive wielded, the more likely this single individual would dictate the daily activities of everyone else. Our culture's innate fear of an overly powerful executive is healthy and has been the lynchpin that maintained our freedom for over two hundred years.

The Framers architected a government system comprised of multiple branches and multiple levels to protect against an unsafe accumulation of power. If more government is deemed necessary by the people, then those responsibilities were dispersed between the national branches or to state and local levels. Power was never to be concentrated in one place—and especially not in a single individual.

Unfortunately, this critical element of our heritage seems to have been diluted. Nowadays, many Americans embrace big government—and especially a big, powerful executive. Why are people unafraid of government, even enamored with government? Proponents of an ever-larger government have deftly deflected people's fears toward corporations, religion, unseen contaminants, chauvinists, and even the weather. Government advocates are always bellowing that these are the real enemies, and only the government can protect people from abuse, emotional trauma, or worse.

Many people want more than protection from real or imagined foes. They want a benevolent executive to take care of them, right every wrong, and insure a fair distribution of necessities. The sad truth is that the only way to make sure everyone has shelter, food, health care, training or education, protection against disability or unemployment, and a risk-free retirement is to try to control the activity and possessions of all three hundred and twenty million people who inhabit our nation. Even if this starts well, it never ends well. One of the ways power corrupts is by inciting the accumulation of ever more power. The only way to stop this gravitational pull toward central power is to place hard limits on executive authority and arduously work to maintain those limits.

Advocates for limited government are often accused of wanting no government. It's a straw man argument that in essence says we must keep every little piece of government or nothing at all.

Limited government advocates do not want to eliminate all government, they only want to return government to its rightful place. This goes double for an overly powerful executive. George Washington said, “The people are not yet sufficiently misled to retract from error ... Evils, which oftentimes in republican governments must be sorely felt before they can be removed.”

Has the angst of an overly powerful executive been sorely felt yet? Compared to just a few years ago, it’s startling how many people are aware of the erosion of constitutional limits and how it will harm the lives of our children and grandchildren. Everyone has not been convinced, however. There are still far too many people who staunchly believe that government is benevolent and can effect great change to make more and more people happy and comfortable in their chosen lifestyle.

Except, there’s a caveat. Sooner or later, big government always oppresses. In fact, any concentration of power oppresses, whether it’s government, theocracy, oligarchs, or global alliances. A tenet of our American culture is that we resist the determined accumulation of power. It’s part of our DNA. This skepticism of powermongers has served us well for several centuries.

Government is a huge game. Some believe the most important game on the planet. We the People set the rules for this game and we’re the referees. It’s time to blow the whistle. We also need to remind every American, and each generation that a key element of our heritage is dispersed and checked power. This important lesson comes directly from our ancestors and the Founders. We ignore it at our peril.

James D. Best, author of [Tempest at Dawn](#), a novel about the 1787 Constitutional Convention, [Principled Action](#), and the [Steve Dancy Tales](#).

Common Core: All Too Common Overreach – Guest Essayist: Cynthia Dunbar

The three branches of the United States government are the Executive, Legislative and Judicial. The U. S. Constitution lays out the power and authority of each of these separate branches. It is important to note that the powers given to each branch are unique and separate and do not overlap or invade the authority of the other two.

Article I details the powers of the Legislative branch, which for the Federal Government is called Congress. All legislative power, or the ability to make law, is given to Congress. This is important to keep in mind when reviewing the authority to of the Executive and Judicial Branches.

Article II details the powers of the Executive Branch, specifically the office of the President. In short, the Executive branch does just that, it executes. This means the Executive branch is responsible for simply putting into force the laws that have been enacted by the Legislative branch.

While the Presidential office is frequently viewed as the most powerful position, it does not actively possess legislative authority. Since the Constitution gives legislative authority to Congress in Article I, the President is constrained to the function of carrying out the laws passed by Congress. Consequently, Congress as a whole arguably holds even more power than does the President of the United States.

Article III grants authority to the Judiciary, more specifically the Supreme Court and all Federal Courts. This is the shortest of the first three Articles of the Constitution, and for good reason. The Founders intended the judiciary to be the weakest branch of the three. The judiciary is responsible to take the laws as passed by Congress and apply them to a given set of facts, otherwise known as a case or controversy.

Three branches were created, and checks and balances put in place as protective barriers from despotic or tyrannical rule. The belief of the Founding Fathers was that keeping power and authority widely distributed was a necessary safeguard to the protection of the people from the government itself. The more the power could be dispersed, the better. That was the same idea behind the principle of Federalism. Federalism acted as a vertical distribution of power between the Federal and State governments. Checks and balances were implemented as a horizontal distribution of power between the three federal branches. The urgency of the Founders to limit power, rather than expand it, was grounded in the belief that to accumulate all authority in one place would be to place the governed at the mercy of tyranny.

At the time of our nation's founding there was a general distrust of large or powerful government, especially government that was far removed from local control and accountability. That is why while legislative authority was granted to Congress, this power was not unlimited. Rather it was limited to those specific areas enumerated in Article I, Section 8. In summary, these areas granted to the Federal government are as follows:

1. The Congress shall have Power To lay and collect Taxes;
2. To borrow Money;
3. To regulate Commerce;
4. To establish an uniform Rule of Naturalization, and
5. To establish uniform Laws on the subject of Bankruptcies;
6. To coin Money;
7. To provide for the Punishment of counterfeiting;
8. To establish Post Offices and post Roads;
9. To secure for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;
10. To constitute Tribunals inferior to the Supreme Court;
11. To define and punish Piracies and Felonies committed on the high Seas, and Offences against

the Law of Nations;

12. To declare War;

13. To raise and support Armies;

14. To provide and maintain a Navy;

15. To make Rules for the Regulation of the land and naval Forces;

16. To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

17. To provide for organizing, arming, and disciplining, the Militia;

18. To exercise exclusive Legislation in all Cases whatsoever, over such District as may become the Seat of the Government of the United States;—And

To make all Laws which shall be necessary and proper for carrying into Execution the **foregoing Powers**.

The Executive branch is called to execute laws that have been constitutionally enacted by Congress. Therefore, if Congress is not possessed with authority to legislate a certain area, then the Executive branch has no authority to execute laws that do not fall within the purview of the Federal Government. If the Executive Branch has no authority to execute laws devoid of constitutional justification, then it certainly has no authority to create such.

James Madison in Federalist Paper No. 47 detailed the extreme need to keep the powers of each branch separate and distinct.

The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed (sic), or elective, may justly be pronounced the very definition of tyranny. Were the federal Constitution, therefore, really chargeable with the accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system. I persuade myself, however, that it will be made apparent to every one, that the charge cannot be supported, and that the maxim on which it relies has been totally misconceived and misapplied. In order to form correct ideas on this important subject, it will be proper to investigate the sense in which the preservation of liberty requires that the three great departments of power should be separate and distinct.

Madison further cited the Baron Montesquieu to clarify the extreme danger of specifically expanding Executive Power through the usurpation of Legislative Authority.

“When the legislative and executive powers are united in the same person or body,” says he, “there can be no liberty, because apprehensions may arise lest THE SAME monarch or senate should ENACT tyrannical laws to EXECUTE them in a tyrannical manner. “

Justice Story in his Commentaries on the Constitution detailed the same concerns the

Constitution addressed to ensure the safety and liberty of all through the vigilant separation of powers.

In the establishment of a free government, the division of the three great powers of government, the executive, the legislative, and the judicial, among different functionaries, has been a favorite policy with patriots and statesmen. It has by many been deemed a maxim of vital importance, that these powers should for ever be kept separate and distinct.

One must only look at the enumerated powers of Congress to ascertain if an area falls within the scope of the Federal Government. If it does not, then Congress should not be passing laws addressing those areas. Even more clearly, the President and Executive Branch should never be making laws or regulations governing these areas.

Education is a clear example of an area not found anywhere within the enumerated powers granted to the Federal Government. Yet, there have been numerous attempts by the Executive Branch through the Department of Education to extensively regulate education, even down to the content that is taught in schools. The constitutional validity for the very existence of the Department of Education (DOE) should be questioned. But its implementation of Common Core State Standards (CCSS) should be questioned even more. The CCSS are just one of many examples of an overreach by the Executive Branch. Through these standards the DOE is not only unconstitutionally exercising legislative authority by essentially creating laws and regulations, but also asserting control over an area that was intended by the Founding Fathers to be Constitutionally beyond its reach.

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Who's To Blame For Presidential Overreach? We Are – Guest Essayist: Byron Schlomach

Much has been made in recent years about the abuse of presidential power. There is no shortage of recent examples to show that this is a legitimate concern. However, this is not entirely the fault of the current administration. Instead, the fault lies with the American people and the other branches of government that have failed to exercise constitutional checks and balances.

Interpretations of the Affordable Care Act have been regularly put forward that result in far more flexibility regarding implementation dates than the actual plain language of the law would allow. It has been shown that the Affordable Care Act was intentionally written so that only individuals buying health insurance through state-created exchanges would receive federal subsidies. Yet, the administration is ignoring the law, flowing subsidies through the federal exchange.

A more recent example of executive overreach is the new rule expanding authority of the Environmental Protection Agency over the waters of the United States to include almost any land where water puddles for significant time. The argument put forth by the EPA is that 117 million

Americans are not protected by the Clean Water Act under current interpretations. But then, the Clean Water Act was never intended to encompass all waters in the country. It was aimed at cleaning up the big rivers and the Great Lakes, the navigable waters of the nation, to make it possible for fish to live in Lake Erie and to prevent chemicals in rivers from catching fire.

Today, some have an entirely new vision for what the EPA. They want it to save the world from man-caused global warming, which is still unproven. They want it to exercise power so as to prevent any chance of harm coming to anyone from any activity by mankind, especially petroleum production. Other than a few isolated situations and scary speculative stories, the new rule put forth by the EPA expanding its power is a solution in search of a problem. Major water pollution disasters are not happening in this country, and every state already regulates water purity and threats to it.

It would be easy to lay all the blame for executive overreach in the United States at the feet of the current administration, but this would be naïve. The blame equally belongs to the legislative and judicial branches. More fundamentally, the blame lies collectively with the people of the United States.

Since the Progressive Era, a presumption has prevailed in the collective mind of Americans that political and social salvation lies in the strong leader, or cadre of leaders, whose wisdom and breadth of knowledge, along with a supporting cast of experts, would best improve the lives of everyone. This attitude cuts across party lines and was reflected best in the administrations of both Roosevelts, Wilson's presidency, and even the presidency of Herbert Hoover. It is now so commonplace that there is little use in differentiating presidencies since FDR except to say that President Reagan, who made some attempt to roll back the practical effects of the philosophy, was the exception.

With the idea that the central federal government actually manages the nation and has the power to create prosperity by doing anything more than smoothing the way for a market economy to prevail, Americans give license to government overreach. Congress, anxious to scratch the people's collectivist itch, enables the executive by granting broad powers to interpret and implement vague laws that empower bureaucratic experts to do their will. The Supreme Court, heavily influenced by prevailing progressive philosophies, has allowed Congress to broadly delegate its legislative powers to the executive. The result is an executive branch that has become an example of nearly unchecked power.

Due to our form of government, we are not at risk of a rapid slide into totalitarianism like that of the German people in the 1930s, but we certainly seem to be getting close. A few more fallen checks and balances wherein a president is allowed to ignore the law with impunity could very well encourage a charismatic future president with dictatorial tendencies to ignore even more fundamental constitutional provisions, like the two-term limit. The current situation whereby individual members of congress determine whether a president is acting legally purely on the basis of partisanship, and the fact that a significant number of Americans apparently feel the same way, is good reason to quake for the future of the United States constitution.

Byron Schlomach earned his PhD in economics from Texas A&M University and has worked in

the state public policy arena for over 20 years. He previously served as Chief Economist at the Texas Public Policy Foundation and the Goldwater Institute. Byron is now Director of State Policy at the 1889 Institute and Scholar in Residence at Oklahoma State University's Free Enterprise Institute.

Dear Mr. President – Guest Essayist: Logan Beirne

This Constituting America study focuses on executive overreach and presidents' potential violation of our Constitution's separation of powers. On the other end of the spectrum, executive inaction can likewise threaten American principles. This essay focuses on President Obama's failure to stand up for one particularly cherished American principle: freedom of speech. The threats posed both by executive overreach and omission are quite deserving of our scrutiny if we want to prevent further drift from the principles and government processes that have historically enabled the United States to thrive.

The below essay was originally published in the Daily Beast on January 17, 2015.

Dear Mr. President

J'Accuse Barack Obama

In not sending a high-level delegation to Paris in the wake of the Charlie Hebdo attacks, the U.S. president has failed to uphold the shared values of two great republics.

France is the United States' oldest ally. Dating back to the United States' founding, France's friendship was crucial to the nascent nation's very survival. This shared history makes American politicians' glaring absence from last weekend's rally in Paris all the more galling. Yes, on Friday, Secretary of State John Kerry gave France "a hug" along with James Taylor's performance of "You've Got a Friend," but the Obama Administration needs to do far more.

The French aided the United States in our war for liberty; we should we stand beside them now as they defend theirs.

"The preservation of the sacred fire of liberty, and the destiny of the republican model of government," George Washington wrote in 1789, are "staked on the experiment entrusted to the hands of the American people." The world still looks to the United States to continue this experiment in republican government. And by not going to Paris, President Obama and our leaders failed the American people by neglecting to stand with France against Islamic extremists' attacks on one of those sacred liberties: freedom of expression.

The absence of the president, vice president, and other top officials from the rally sent a dangerous message. It showed the world that the United States' leaders cannot be counted on to stand up for one of its core beliefs; it indicated that the nation is selective in its support, even for its oldest ally. And if history has taught us anything, it is that messages matter.

During the United States' battle for independence, General George Washington astutely recognized that he could not win the war solely through military tactics. He had to inspire the American people and rest of the world to believe in the righteousness of the patriots' fight for liberty. Unlike other generals of his day who orchestrated battles from afar, Gen. Washington was at the front lines, courageously risking his life to fight alongside his troops. It was precisely such symbolism that moved the patriots to sacrifice for the liberties we enjoy today. And we need our leaders to continue to be at the front lines of America's ongoing ideological struggle.

In 1778, Benjamin Franklin and the American patriots convinced France to join their fight for independence by entering with them into the "Treaty of Alliance and a Treaty of Amity and Commerce." As the fledgling United States struggled against Britain, the patriots were desperate for French troops, munitions, ships, and funds.

"A freeman, contending for his liberty on his own ground, is superior to any slavish mercenary on earth."

Sure, the French did not aid the American patriots due to any great love of liberty. The French were still governed by their own king, after all. Instead, the French government helped for selfish reasons: they sought to defeat France's old British foes. The Americans were the enemies of their enemies, as the ancient proverb goes. And in a long, global war that cost thousands of American and French lives and nearly bankrupted both nations, the allies beat the mightiest empire on earth. Yes, America's relationship with France has had its ups and downs since then: the United States refused to aid the French revolutionaries when they overthrew their own monarch in the 18th century because the Americans deemed them too radical. But that rift was repaired by 1885, when France gave the United States the Statue of Liberty to commemorate the nations' commitment to liberty. Then during World War I and again in World War II, the United States stood with France in defense of liberty, for which Charles de Gaulle symbolically returned the favor with his very conspicuous presence as our nation grieved following the Kennedy assassination.

Though the two nations' histories may be mixed and their approaches to free speech somewhat varied, the United States and France's interests are largely aligned now as we confront another threat to freedom.

Over the past two and half centuries, our mutual foe has transformed from a monarchy to a fundamentalist ideology; but the fight for liberty nevertheless rages on.

Since the Revolutionary War, American republican ideology has spread throughout the globe. The patriots' triumph soon ignited uprisings in France, Ireland, the Netherlands, Poland, Haiti, and Latin America, and, over time, values such as free expression came to take deeper root, fueled in part by the American example. Over the following centuries, these principles were adopted to varying degrees around the world, helping to lead to a level of liberty the likes of which the earth has never previously enjoyed.

Far from an inevitable progression, the United States' founding principles were tested and faced ruin numerous times throughout the ages—by the European monarchies, by the fascists, and by

the communists. But against each, the ideology of individual liberty triumphed as American troops and their allies fought oppressive regimes.

But now those principles are threatened again by a competing ideology: militant Islamic extremism. With ISIS being the chief example, people are turning by the thousands towards an ideology of oppression and violence.

Ideological wars are not won by guns alone. They are won by ideas. That's why the president missed a critical opportunity last weekend to reaffirm the nation's support for one of our most fundamental ideals: freedom of expression. As Gen. Washington put it, if "the freedom of Speech may be taken away,... dumb and silent we may be led, like sheep, to the Slaughter."

It is time for the nation's leadership to unequivocally demonstrate America's commitment to our core principles. Through words *and* actions the president must galvanize the American people and the world to defend freedom of expression. He needs to go to the front lines, which currently include Paris, and as Gen. Washington phrased it, "show the whole world that a freeman, contending for his liberty on his own ground, is superior to any slavish mercenary on earth." Gen. Washington understood that America's enemies only respond to forceful resolve.

If President Obama does not visibly stand up for American principles of liberty alongside the nation's allies, we will lose ground to latest threat to the continuing American experiment—and that "sacred fire of liberty" will darken.

Logan Beirne is an ISP Fellow at Yale Law School and the author of [Blood of Tyrants: George Washington & the Forging of the Presidency](#).

Real Possibility Of A Federal Takeover Of Elections: The Role Of The U.S. Department Of Justice Aiding And Abetting Progressive Organizations To Weaken States' Voting Laws – Guest Essayist: Catherine Engelbrecht

Executive Overreach in American Elections

Perhaps one of my favorite cultural artifacts from the 1990s was those *Magic Eye* prints you could find in gift shops just about anywhere. They might look like a random assortment of colorful dots – but with a trained eye, images would practically spring forth from the frame. Sometimes executive overreach will seem as covert as a bull in a china shop. But in other cases – particularly when it comes to elections – misdeeds literally appear before you after the noise and distractions have been filtered out. The Obama Administration's recipe of courtroom intimidation, activist collusion and bald-faced disdain for state powers to administer elections has laid the foundation for an eventual federalization of every citizen's most basic form of raw power.

The Soft Bigotry of Voter ID Opposition

The U.S. Department of Justice has been used as the go-to muscle when fighting against election

integrity reforms across many states since 2009. The Civil Rights Division of the DOJ might have jumped into the political zeitgeist early on with the bungling of the *New Black Panther Party* voter intimidation case,[1] but it will be remembered for its apparent bigotry in opposing voter ID and other common-sense laws in later lawsuits.

Since President Obama and Co. assumed office, North Carolina, South Carolina, Texas and Wisconsin have been required to defend their voter ID and other election integrity laws in court under one federal statute or another. Although the factual backgrounds vary between each case, the underlying theory behind opposing such wildly popular laws was strikingly consistent. In a more recent suit involving North Carolina's law, the DOJ dropped the pretense and admitted that the Administration does not believe minority voters to be "sophisticated" enough to comply with a voter ID law on a larger scale.[2] For the Administration to claim the moral high ground on discrimination in voting, yet justify its positions based on the soft bigotry of low expectations, the net impact of the Obama DOJ's crusade against integrity reforms is clear: states should not flex their muscles on election administration for any unsanctioned purpose.

Leading from Behind

If you were to venture over to the U.S. Department of Justice's [website](#) and look at all the cases currently being litigated regarding voting laws, the disconnect between rhetoric and reality would be quite apparent. Last year, President Barack Obama told the attendees of Rev. Al Sharpton's National Action Network's annual convention that "[The DOJ has] taken on more than 100 voting rights cases since 2009, and they've defended the rights of everybody from African Americans to Spanish speakers..."[3] How does the President reconcile the rhetoric with the paltry two dozen cases the DOJ has actually brought? In sum, it helps to have allies with litigation budgets to burn.

Fighting voter ID laws and other election integrity reforms has proven to be expensive and largely unsuccessful. Even the DOJ knows that it cannot be in the business of simply chasing the political victory in one courtroom after another. As a result, the Obama Administration has worked closely with ideological partners on the nuisance lawsuit strategy in battleground states over the years. In July 2014, former Attorney General Eric Holder announced that the Administration was taking separate action against both Ohio and Wisconsin over election integrity reforms ahead of the midterm election.[4] But instead of bearing the brunt of expenses and labor, the DOJ let the NAACP and other progressive organizations do the heavy lifting. The Wisconsin voter ID law would later survive the attacks and commenced enforcement this year.[5] The Ohio lawsuit was later settled under terms not entirely acceptable to the activist plaintiffs.

Guarding Vulnerabilities

The most brazen example of executive overreach occurred in what would seem to be one of the most obscure offices of our federal government. Whenever a state wishes to amend the local instructions for filling out the National Mail Voter Registration Form,[6] they must submit the proposals to the U.S. Election Assistance Commission (EAC) for approval – assuming there are actual Commissioners seated.

In 2013, Arizona and Kansas felt it necessary to require a proof of U.S. citizenship when applying for voter registration in those states. True the Vote had previously found that the current system of answering the question, “Are you a citizen of the United States of America?”[7] under the penalty of perjury did not deter noncitizens from becoming registered in Texas.[8] But despite the lack of quorum to decline such a request and clear indicators demonstrating the benefits of citizenship verification,[9] the EAC’s clerical staff rejected the reforms.[10] Bottom line – two American states were denied the opportunity to protect their voter registries from dilution by noncitizen voters thanks to a person who essentially answered a *help wanted* posting from the EAC.[11] Who needs weaponized, expensive bureaucracies when individual federal employees can engage states in a game of *Mother May I*? Kansas and Arizona are now forced to seek remedies before the U.S. Supreme Court.

The effort to shift election administration powers from local to federal offices is nothing new. The aftermath of the 2000 election cycle inspired scores of multi-front campaigns to change voting to fit the needs of political interests. The Obama Administration will go down in history as one that worked tirelessly to speed up the centralization of elections using any tool available, regardless of outcome. These divisive, seemingly disjointed tactics might not win every battle, but they made great strides in politicizing what should be dry process matters. It’s up to engaged voters to vigilantly resist these efforts on all fronts.

Catherine Engelbrecht is the Founder of True the Vote, the nation’s leading voters’ rights and election integrity organization based in Houston, Texas. To learn more, visit truethevote.org.

[1] *United States v. New Black Panther Party, MS* (E.D. Pa. 2009), http://www.justice.gov/crt/about/vot/misc/philadelphia_bpp_comp.php

[2] *North Carolina State Conference of the NAACP et al. v. North Carolina* (1:13cv658): Testimony of Professor Charles Stewart, MIT (<https://www.scribd.com/doc/243713319/Doc-165-Transcript>)

[3] The White House Office of the Press Secretary; Remarks by the President at the National Action Network’s 16th Annual Convention (4/11/2014), <https://www.whitehouse.gov/the-press-office/2014/04/11/remarks-president-national-action-networks-16th-annual-convention>

[4] U.S. Department of Justice Office of Public Affairs; Attorney General Holder Announces Justice Department Filings in Voting Rights Cases in Wisconsin and Ohio (7/30/2014), <http://www.justice.gov/opa/pr/attorney-general-holder-announces-justice-department-filings-voting-rights-cases-wisconsin>

[5] Wisconsin Government Accountability Board; Photo ID Required After April 2015 Election (3/23/2015), <http://www.gab.wi.gov/node/3580>

[6] Federal Voter Registration Form (Rev. 3/1/2006) ENGLISH pp. 8-25, http://www.eac.gov/assets/1/Documents/Federal%20Voter%20Registration_6-25-14_ENG.pdf [7] *Ibid.* p. 4

[8] Brief of the American Civil Rights Union as *Amicus Curiae* in Support of Petitioners; *Kobach v. United States Election Assistance Commission et al.* (No. 14-1164), <http://publicinterestlegal.org/files/14-1164-ACRU-Amicus.pdf>

[9] True the Vote Public Comment RE EAC-2013-0004 (1/3/2014), <https://www.scribd.com/doc/241623279/2014-1-3-Eac-Public-Comment-Eac-2013-0004-0002->

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[10] U.S. Election Assistance Commission Memorandum of Decision Concerning State Requests to Include Additional Proof-of-Citizenship Instructions on the National Mail Voter Registration Form (Docket No. EAC-2013-0004) (1/17/2014),

<https://www.scribd.com/doc/200599631/20140117-EAC-Final-Decision-on-Proof-of-Citizenship-Requests-FINAL>

[11] PJ Media; Meet the Federal Bureaucrat Who Would Not Let Kansas Prevent Foreigners from Voting (5/5/2015), <http://pjmedia.com/jchristianadams/2015/05/05/meet-the-federal-bureaucrat-who-stopped-kansas-from-preventing-foreigners-from-voting/>

What Would George Washington Say About The U.S. Now? – Guest Essayist: Logan Beirne

The below was originally published in FoxNews.com Opinion July 4, 2013

We have strayed from the path our Founders forged 237 years ago. Under the Constitutional Republic they created after the Revolutionary War, the United States has prospered over the centuries beyond the founding generation’s wildest dreams; however, we are wandering further from those very Constitutional principles that enabled us to thrive.

Our Founders developed an ingenious system of checks and balances, which George Washington described as, “though not absolutely perfect, it is one of the best in the world.” This government “by the people, for the people,” empowered the citizenry to select representatives that would unite the nation’s factions while protecting those liberties so many died to defend.

But over the years, power has shifted from the local level to the federal government, where bitter partisanship clogs the mechanisms of that ingenious system by which we might begin to repair. If history is a guide, Washington would not give up on our Constitutional Republic now – he would fight to return it to its proper functioning. And he would begin by rallying the electorate. As he did during his time, he would extol us to replace wayward politicians with leaders who will act in the best interests of the country instead of their party.

The evils of modern politics were foreshadowed by the prescient words of the founding generation.

Washington, our nation’s first and only president with no declared party allegiance, was perhaps the most weary of the harms caused by uncompromising political factions.

With the ink on the Constitution barely dry, the nation fractured into competitive political parties. President Washington derided these factions as “[a] fire not to be quenched, . . . demand[ing] a uniform vigilance to prevent its bursting into a flame, lest, instead of warming, it should consume.” He believed that they “agitate[d] the community with ill-founded jealousies and false alarms, kindl[ing] the animosity of one part against another.”

Fortuitously, Washington prescribed how we might fight that fire: “by force of public opinion.”

James Madison echoed this sentiment in Federalist 10, where he suggested we might cure our partisan ills via an engaged electorate who diligently watch their leaders.

Our Founders charged us, the public, with the responsibility to elect those representatives that will rightfully uphold our Constitution – and reject those who place their own power and parties over the good of the nation. And what if we cannot find any good candidates? Run for office. It is our civic duty.

On this July Fourth, we find ourselves in a great country that is mired by politicians who seem to expend more resources fighting one another than adhering to our Constitution.

The United States government was never meant to be a “team sport” of Democrats vs. Republicans.

Our forward thinking Founders have gifted us with advice from the grave: we must beat back the partisanship with our votes and civic involvement, and install principled leaders, as our Founders were.

If we are to lead our nation towards those core Constitutional principles that have enabled us to prosper, we do so “by force of public opinion.”

“The foundation of our Empire was not laid in the gloomy age of Ignorance and Superstition, but at an Epocha when the rights of mankind were better understood and more clearly defined,” Washington wrote in 1783, “At this auspicious period, the United States came into existence as a Nation, and if their Citizens should not be completely free and happy, the fault will be entirely their own.”

Logan Beirne is an ISP Fellow at Yale Law School and the author of [Blood of Tyrants: George Washington & the Forging of the Presidency](#).

Save The Sawbuck – Guest Essayist: Logan Beirne

Executive overreach can come in many forms. In this essay, we explore an executive department’s surprising announcement and its symbolic ramifications.

Save Hamilton! The Treasury Department has taken another shot at the founder of our financial system, announcing that Alexander Hamilton’s image will be replaced on the \$10 bill. This move represents a glaring disregard for our nation’s history.

U.S. Treasury Secretary Jack Lew announced Wednesday that he is replacing the current image of the nation’s first Treasury Secretary, with that of a woman. He has not yet disclosed which woman, but he has singled out Hamilton for demotion. Putting more women onto U.S. currency is a laudable goal – but Hamilton is the wrong man to replace.

Hamilton was a self-made man who believed in the boundless potential of the United States as a

self-made nation. Born out of wedlock on the island of Nevis and orphaned at the age of 13, Hamilton came to American shores alone as a teenager in search of education and opportunity.

The struggle against British rule became both his education and opportunity. As a war hero and aide-de-camp to George Washington, he was instrumental in winning America's independence. As a writer and advocate, he persuaded the nation to ratify the Constitution that he had helped to frame.

Without Hamilton, the United States would not exist as we know it. These accomplishments alone make Hamilton worthy of recognition, but what makes him particularly suited for prime real estate on our currency is that he laid the foundations for the U.S. capitalist system.

After the Revolutionary War, the new United States was tatters. The economy buckled under staggering war debts, the first national currency had collapsed, states fought trade wars against one another, and the national Congress was, as Washington described it, a "half-starved government [that] limped along on crutches, tottering at every step."

As the inaugural Secretary of Treasury, Hamilton rescued the fledgling United States's credit, created a national bank to help manage the nation's trade and finances, and utilized the tax system to encourage economic development. He believed in the limitless energy and ingenuity of American enterprise, writing: "As to whatever may depend on enterprise, we need not fear to be outdone by any people on earth." But American enterprise could only flourish with the right financial framework in place. Hamilton was the architect of that framework.

Throughout history, many have argued with Hamilton's methods and criticized his personal life. With his penchant for duels and a famous extramarital affair, Hamilton was no saint. But as he said, "I never expect to see a perfect work from imperfect man." And there is no getting around the fact that Hamilton laid the foundation for the United States to become the economic superpower it is today.

The impetus for this overhaul of U.S. bills stems from an online petition earlier this year to replace Andrew Jackson on the \$20 with abolitionist Harriet Tubman. But under the Treasury Department's current plan, Jackson retains his place, and it is Hamilton whom will be relegated to the reverse side of the \$10 bill, in a separate series of bills, or alongside another individual. Sharing the space is likewise a disservice to the honored woman, who should likewise have her own bill.

Thankfully, under federal law, the \$1 bill cannot be redesigned. Otherwise, the U.S. Treasury might next try to wipe the Father of Our Country, George Washington, off of our bills. Since the nation's founding, United States currency's appearance has been viewed as a highly symbolic display of the American values. As such, it is commendable to include more women on our currency, but targeting Hamilton for replacement signals a disrespect for our history and founding.

General Washington wrote of Hamilton in 1781, "This I can venture to advance from a thorough knowledge of him, that there are ... none whose Soul is more firmly engaged in the cause, or

who exceeds him in probity and Sterling virtue.” The U.S. Treasury should take Washington’s word for it and preserve Hamilton’s prominent place on the sawbuck.

Logan Beirne is an ISP Fellow and Lecturer in Law at Yale Law School and author of “Blood of Tyrants: George Washington & the Forging of the Presidency” (Encounter Books)

Judicial Activism Rescues Obamacare – Guest Essayist: Nancy Salvato

The Supreme Court has been in the news this week and Justice John Roberts has been thrust into the spotlight because he authored the majority opinion in *King v. Burwell*. In it, Roberts and the Court upheld the Patient Protection and Affordable Care Act, i.e. Obamacare. This is no ordinary decision, though. The court’s ruling doesn’t simply interpret the law, it rewrites the law.

Peter Suderman writes in, “In Upholding Obamacare’s Subsidies, Justice Roberts Rewrites the Law—Again” about how Roberts goes beyond interpreting the law in the majority decision.

“Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them,” he writes. “If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter.”

And so Roberts decided that a law which explicitly and repeatedly states that subsidies are limited to exchanges “established by a State,” and which defines “State” as one of the 50 states or the District of Columbia, actually allows subsidies in exchanges established by a State or the federal government. Roberts’ decision does not interpret Obamacare; it adds to it and reworks it, and in the process transforms it into something that it is not.

Or as John Podhoretz explains, even more succinctly in his article, “The twisted logic of John Roberts’ ObamaCare ruling,”

The language is plain, as even Roberts acknowledges: “An individual [is eligible] to receive tax credits only if the individual enrolls in an insurance plan through ‘an Exchange established by the State.’”

Roberts seems to have forgotten what federalism means. Ninja Words defines it this way:

Federalism: A system of national government in which power is divided between a central authority and a number of regions with delimited self-governing authority.

Should any state decide not to establish exchanges, that is the state’s right. After all, this is how federalism works. Citizens can vote with their feet, as it were. Roberts not only disregarded the 10th Amendment, he ignores the separation of powers between the three branches of government.

Suderman paraphrases Justice Scalia’s dissent for his readers.

If Roberts had truly wanted to defer to Congress, he could have ruled that the law means what says rather than what it does not, and effectively handed the issue back to the legislature, letting Congress decide whether and how to update the law in accordance with its own wishes. Instead, Roberts made the choice for Congress—taking its power to craft law for itself. As Scalia writes, “the Court’s insistence on making a choice that should be made by Congress both aggrandizes judicial power and encourages congressional lassitude.”

True, our Legislative Branch abdicated its responsibility by carelessly crafting Obamacare and passing it hastily. By doing so, the Legislative Branch of government did not perform its duties in the best interest of the people by, using then House Majority Leader Nancy Pelosi’s words, passing the bill before knowing what’s in it. One of the reasons why the law passing process is so cumbersome is because the Framers understood how important it is to think through the repercussions of laws and not to act hastily. By abdicating its responsibility, it left the law -not only open to judicial interpretation- but to actual revision by activist judges on a Supreme Court. Judicial Activism by judges is not a new development.

Cato Institute’s Ilya Shapiro writes in, “Justice John Roberts’s Obamacare Decision Is an Orwellian Mess,”

Activism, typified by the four Democratic-appointed justices, finds in the Constitution no judicially administrable limits on federal power.

The law in question forces citizens to purchase health insurance or pay a tax. Ilya Shapiro writes in, The Obamacare “Tax” That Chief Justice Roberts Invented Is Still Unconstitutional,

Two years ago, Chief Justice John Roberts changed the Affordable Care Act’s individual mandate into a tax and thus rescued President Obama’s signature legislation.

Interestingly, according to the Origination Clause in the US Constitution, all money bills are supposed to originate in the House of Representatives. The bill in question began in the Senate. When Robert’s court determined it was a tax, it should have been deemed unconstitutional, yet it was left standing. Here is why.

Taxes that are “analogous to fines” are exempt from the clause’s requirements, in that they enforce compliance with a law passed under one of Congress’s other enumerated powers—not the taxing power—but John Roberts foreclosed that interpretive option here.

The bill is also an attack on the 9th Amendment of the Constitution, which guarantees people any rights not specifically listed in the Bill of Rights. The insurance in question is overpriced and low socio-economic status citizens who qualify will receive subsidies to make it more affordable. Progressive taxes penalize those whose tax dollars provide this entitlement yet do not benefit from it. In addition, the law penalizes those who choose not to purchase insurance.

The constitution should not be transgressed because we are a rule of law, not of men. We are not a democracy; we are a constitutional-republic. Yet most citizens in this country think the words democracy and republic are interchangeable. The Framers agreed with Aristotle who equated

democracy with mob rule and considered it a perversion of constitutional government.

The 10th Amendment is being disregarded by the federal government. The Supreme Court is not interpreting the law but crafting language for the law and the Legislative Branch seems to be yielding its power to the Judicial Branch. However, the people are still sovereign in this nation. What can the people do? For the long term, only representatives who understand and uphold the rule of law should be eligible to hold office. All citizens must understand the rule of law. In the short term, those holding office must consider removing judges who are not exhibiting good behavior, i.e. legislating from the bench. If they are unwilling to do their job, this must become an election issue. Our freedom is at stake.

Nancy Salvato's education career includes teaching students from pre-k to graduate school. She has also worked as an administrator in higher education. Her private sector efforts focus on the advancement of constitutional literacy. She attended the National Endowment for the Humanity's National Academy for Civics & Government, and is the author of "Keeping a Republic: An Argument for Sovereignty."

The Supreme Court: Paving The Way For Executive Branch Overreach – Guest Essayist: Elliot Engstrom

Last week, the United States Supreme Court once again opted not to rule a key provision of the Affordable Care Act unconstitutional. The case at issue, *King v. Burwell*, was technically not a challenge to the Affordable Care Act itself but rather the IRS's implementation of the Act.

"In a democracy," Chief Justice Roberts wrote for the majority, "the power to make the law rests with those chosen by the people. Our role is more confined—"to say the law is."

Such a statement is quite ironic given that the decision takes a statutory phrase and then contorts it to say the exact opposite of its natural meaning. While the policy implications of the Supreme Court's upholding of the ACA will likely grab most of the headlines in the coming weeks, the Court's complete abdication to the Executive on matters of statutory interpretation could shake the very foundations of our democracy for decades to come.

Administrative agencies like the Internal Revenue Service are outgrowths of the Executive Branch, which is charged with enforcing our nation's laws. Therefore, any power given to such an agency is by implication given to the Executive. Last week's decision granted administrative agencies a powerful new tool for reaching far beyond their congressional mandate. In doing so, the Court has paved the way for the Executive Branch to overreach even further beyond its congressional mandate by appealing to the principles enunciated by the Roberts court.

The fundamental question at issue in *King v. Burwell* was whether the IRS had exceeded its congressional mandate. The Affordable Care Act (ACA) sets up a scheme through which individuals purchase health insurance through government-run "Exchanges." The ACA, as written, authorizes the IRS to provide tax subsidies only to those who purchase their healthcare through an Exchange "established by the State." However, the IRS opted to provide subsidies to

Americans who purchased their health insurance through Exchanges established by both the state and the federal government.

Chief Justice Roberts admits outright that “the context and structure of the Act compel us to depart from what would otherwise be the most natural reading of the pertinent statutory phrase.” Justice Scalia had a biting response to this statement:

The Court claims that “the context and structure of the Act compel [it] to depart from what would otherwise be the most natural reading of the pertinent statutory phrase.” I wholeheartedly agree with the Court that sound interpretation requires paying attention to the whole law, not homing in on isolated words or even isolated sections. Context always matters. Let us not forget, however, *why* context matters. It is a tool for understanding the terms of the law, not an excuse for rewriting them.

The saddest part about Justice Scalia’s dissent is that, as of the Court’s opinion this morning, he is wrong. He is not wrong because he is articulating the principles of statutory construction incorrectly. He is now wrong because the Supreme Court is not simply an interpreter of law – it is also itself a creator of law.

Generally, regulations are evaluated under the *Chevron* test to determine whether they exceed the mandate of Congress. That test asks whether to grant deference to a government agency’s interpretation of a statute that it administers.

However, the Court opted not to use the *Chevron* framework. Its stated reason for doing so was because this is an “extraordinary” case that affects a question of deep “economic and political significant” – the question of whether subsidies are available on Federal Exchanges. Under this rationale, the Court stretched the amount of deference due to administrative agencies to the point where the Internal Revenue Service now has the “discretion” to take an action that is the exact opposite of what the statute explicitly states.

In order to determine whether such deference is warranted under *Chevron*, the Court is first supposed to ask whether Congress has spoken directly to the precise question at issue. If the intent of Congress is clear, that is the end of the matter. However, if Congress has not directly addressed the question at issue, then the Court should simply determine “whether the agency’s answer is based on a permissible construction of the statute.”

It would seem that the Court, before ever taking up the case, decided that it would find a way to uphold the Affordable Care Act. However, in doing so it has handed administrative agencies, and therefore the Executive, a powerful new tool. For years to come, executive-level agencies will argue in federal courts throughout the nation that they have discretion to do as they please, all due to the fact that their actions affect questions of “economic and political significance.” This Court has left its subordinate tribunals with the task of determining when an issue of such “significance” that executive agencies should have unfettered discretion to ignore the limitations of Congress and instead unilaterally carry out the will of the Executive.

The Roberts court today secured its legacy as a Court that twisted the law in order to serve a

predetermined purpose of upholding the political class's cause of choice. If it was not bad enough that this legacy in the short term leaves the American people with a healthcare system that focuses on "coverage" and "insurance" rather than actual access to healthcare and cost controlling measures, in the long term the Court's jurisprudence will surely be cited for years to come as the tool of choice for the Executive Branch to expand its power far beyond its congressional mandate.

Elliot Engstrom is an attorney with the Civitas Institute Center for Law and Freedom, www.nccivitas.org.

Happy Independence Day! Read The Declaration of Independence with your family and friends!

[Click Here](#) to Hear Constituting America Founder & Co-Chair Actress Janine Turner read the Declaration of Independence!

The Declaration of Independence: A Transcription

From the National Archives

website: http://www.archives.gov/exhibits/charters/declaration_transcript.html

IN CONGRESS, July 4, 1776.

The unanimous Declaration of the thirteen united States of America,

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, —That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.—Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.

He has refused his Assent to Laws, the most wholesome and necessary for the public good. He has forbidden his Governors to pass Laws of immediate and pressing importance, unless

suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

He has refused to pass other Laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only.

He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public Records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people.

He has refused for a long time, after such dissolutions, to cause others to be elected; whereby the Legislative powers, incapable of Annihilation, have returned to the People at large for their exercise; the State remaining in the mean time exposed to all the dangers of invasion from without, and convulsions within.

He has endeavoured to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands.

He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary powers.

He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.

He has erected a multitude of New Offices, and sent hither swarms of Officers to harrass our people, and eat out their substance.

He has kept among us, in times of peace, Standing Armies without the Consent of our legislatures.

He has affected to render the Military independent of and superior to the Civil power.

He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation:

For Quartering large bodies of armed troops among us:

For protecting them, by a mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States:

For cutting off our Trade with all parts of the world:

For imposing Taxes on us without our Consent:

For depriving us in many cases, of the benefits of Trial by Jury:

For transporting us beyond Seas to be tried for pretended offences

For abolishing the free System of English Laws in a neighbouring Province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies:

For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Governments:

For suspending our own Legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever.

He has abdicated Government here, by declaring us out of his Protection and waging War against us.

He has plundered our seas, ravaged our Coasts, burnt our towns, and destroyed the lives of our people.

He is at this time transporting large Armies of foreign Mercenaries to compleat the works of death, desolation and tyranny, already begun with circumstances of Cruelty & perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation.

He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country, to become the executioners of their friends and Brethren, or to fall themselves by their Hands.

He has excited domestic insurrections amongst us, and has endeavoured to bring on the inhabitants

of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions.

In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people.

Nor have We been wanting in attentions to our British brethren. We have warned them from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow these usurpations, which, would inevitably interrupt our connections and correspondence. They too have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity, which denounces our Separation, and hold them, as we hold the rest of mankind, Enemies in War, in Peace Friends.

We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do. And for the support of this Declaration, with a firm reliance on the protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.

The 56 signatures on the Declaration appear in the positions indicated:

Column 1

Georgia:

Button Gwinnett

Lyman Hall

George Walton

Column 2

North Carolina:

William Hooper

Joseph Hewes

John Penn

South Carolina:

Edward Rutledge

Thomas Heyward, Jr.

Thomas Lynch, Jr.

Arthur Middleton

Column 3

Massachusetts:

John Hancock

Maryland:

Samuel Chase

William Paca

Thomas Stone
Charles Carroll of Carrollton

Virginia:

George Wythe
Richard Henry Lee
Thomas Jefferson
Benjamin Harrison
Thomas Nelson, Jr.
Francis Lightfoot Lee
Carter Braxton

Column 4

Pennsylvania:

Robert Morris
Benjamin Rush
Benjamin Franklin
John Morton
George Clymer
James Smith
George Taylor
James Wilson
George Ross

Delaware:

Caesar Rodney
George Read
Thomas McKean

Column 5

New York:

William Floyd
Philip Livingston
Francis Lewis
Lewis Morris

New Jersey:

Richard Stockton
John Witherspoon
Francis Hopkinson
John Hart
Abraham Clark

Column 6

New Hampshire:

Josiah Bartlett
William Whipple

Massachusetts:

Samuel Adams
John Adams
Robert Treat Paine
Elbridge Gerry

Rhode Island:

Stephen Hopkins
William Ellery

Connecticut:

Roger Sherman
Samuel Huntington
William Williams
Oliver Wolcott
New Hampshire:
Matthew Thornton

Examining The Use Of Administrative Actions In The Implementation Of The Affordable Care Act – Guest Essayist: Grace-Marie Turner

Companies inside and outside the health sector have spent countless billions of dollars trying to comply with the ACA. When the administration makes what some call “minor temporary course corrections,” it causes a new cascade of disruption and expenses for companies and makes it even harder for them to comply not only with the law but with ever-changing regulations. We have a process by which laws are to be enacted and changed, and that process has not been followed in implementing key provisions of the Affordable Care Act, as I have described here. I thank the committee for holding this hearing today to shed light on this issue. If our constitutional system of government is to survive, it must be based upon the rule of law.

Testimony presented by Grace-Marie Turner, President, Galen Institute to the Ways and Means Subcommittee on Oversight on May 20, 2015

Rep. Peter Roskam, Chairman

Rep. John Lewis, Ranking Member

Hearing on Examining the Use of Administrative Actions in the Implementation of the Affordable Care Act

Chairman Roskam, Ranking Member Lewis, and members of the committee, thank you for the opportunity to testify today on the use of administrative actions to implement the Affordable Care Act.

My name is Grace-Marie Turner, and I am president of the Galen Institute, a non-profit research organization focusing on patient-centered health policy reform. I served as an appointee to the Medicaid Commission from 2005-2006, as a member of the Advisory Board of the Agency for Healthcare Research and Quality from 2005 to 2007, and as a congressional appointee to the Long Term Care Commission in 2013.

The U.S. Supreme Court is considering a question that goes to the heart of the issue before the committee today. Did the Obama administration, through the Internal Revenue Service, have legal authority to allow premium assistance tax credits to be available in federally-facilitated

health insurance exchanges? Or are the credits available only through an “Exchange established by the State,” as the law specifies numerous times.

The court will decide that question within a month. I understand other witnesses today will be addressing issues in *King v Burwell*. But this is by no means the administration’s only controversial action involving regulatory interpretation that challenges the language of the statute. The Galen Institute has been chronicling changes made to the Affordable Care Act since it was enacted in 2010, and we count at least 50 changes – 31 of them made by the administration. In addition, there have been 17 changes passed by Congress and signed into law by President Obama, and two changes made by the Supreme Court. I have appended our list to my testimony.¹

Today, I will discuss 1) examples of actions by the administration that are clearly contrary to the statute; 2) failed and successful congressional actions to provide legal authority to changing the law; and 3) additional changes only now being uncovered.

Administration actions contrary to the statute

Many of the changes the administration has made through regulation are not based upon the language of the statute. A few examples:

- *Employer mandate delay*: An announcement leaked on July 2, 2013, that the administration would not take enforcement action until the beginning of 2015 against employers that fail to comply with the law’s employer mandate requirements.² The ACA requires the provision to have taken effect on January 1, 2014. The administration subsequently announced an additional change, allowing employers with at least 50 but fewer than 100 employees an additional year to comply with the law.
- *Self-attestation*: Because of the difficulty of verifying income and employment after the delay of the employer reporting requirement described above, the administration decided to allow “self-attestation” of income and eligibility by people applying for health insurance in the exchanges.³ Besides being contrary to the requirements in the statute, this has caused a cascade of hardship for people who understated their income. When they filed their income tax returns with the IRS this spring, they were required to reconcile the amount of subsidy they received with their actual income. More than half by one estimate had to pay back some or all of the subsidy the government had paid to health insurance companies on their behalf to reduce their monthly premiums. H&R Block estimates that 52 percent of its customers who received health coverage through the insurance exchanges in 2014 owed an average subsidy repayment of \$530.⁴
- *Medicare Advantage cuts*: The administration continues to resist efforts by government auditors to comply with the law regarding payments to Medicare Advantage plans. To pay for expanded Medicaid and exchange insurance, the ACA calls for significant cuts to the popular MA program, which provides seniors with access to private health plans within Medicare. The nonpartisan Government Accountability Office called for the administration to cancel an \$8.3 billion program it has tapped to pay “quality bonuses” to

Medicare Advantage insurance plans. The administration has used the bonus payments to postpone the pain of cuts to MA plans that are called for in the law. Most of the money has gone to plans rated average or worse. The GAO concluded, “The Secretary of HHS should cancel the MA Quality Bonus Payment Demonstration and allow the MA quality bonus payment system established by PPACA to take effect. If, at a future date, the Secretary finds that this system does not adequately promote quality improvement, HHS should determine ways to modify the system, which could include conducting an appropriately designed demonstration.”⁵ The administration ignored the GAO’s recommendation, and it also has ignored demands from Congress to stop the illegal payments.

Other controversial administration actions include several decisions to permit insurers to renew noncompliant policies in the individual and small group markets until in some cases October 1, 2016, even though the law explicitly says that plans must be compliant with the law’s coverage standards no later than January 1, 2014.⁶ The administration also has created special enrollment periods that have exempted individuals from fines and penalties called for in the statute.⁷ I refer you to the appendix in my testimony for additional examples of the administration’s regulatory changes to the law.

Lack of transparency

The administration also has been criticized for its lack of transparency in its financing of the implementation of the law. For example:

- *Co-op funding:* The administration released a list on December 22, 2014, of \$300 million it had allocated in “solvency funds” last year to Consumer Operated and Oriented Plan (co-op) plans.⁸ There is no explanation of the criteria used to determine why some co-ops received added federal funding and others didn’t and why some received very generous awards and others much smaller amounts – or nothing. Nor is there any explanation about who decides which co-ops fail and which get additional infusions of federal funds. The branch of CMS in charge of overseeing the co-op program, the Center for Consumer Information & Insurance Oversight (CCIIO), is supposed to allow the various co-ops to draw down the funds in increments as they meet or exceed developmental milestones – but those milestones remain confidential contractual agreements that have not been disclosed to the public.
- *Cost-sharing reductions:* Treasury Department has rebuffed a request by Ways and Means Chairman Rep. Paul Ryan to explain \$3 billion in payments the administration has made to health insurers even though Congress never authorized the spending through annual appropriations.⁹ The payments to insurers are known as cost-sharing subsidies designed to limit out-of-pocket costs for certain low income individuals for health insurance deductibles, co-payments, and co-insurance. But Congress never authorized any money to make these payments to insurers in its annual appropriations. The administration made the payments anyway. The issue is part of the lawsuit filed by House Speaker John Boehner. Administration lawyers contend that congressional leaders are wrong, saying in a legal brief, “The cost sharing reduction payments are being made as part of a mandatory

payment program that Congress has fully appropriated.” But the administration undercut its own argument when HHS asked Congress for an annual appropriation of \$4 billion to finance the cost-sharing payments in 2014 and another \$1.4 billion “advance appropriation” for the first quarter of fiscal year 2015, “to permit CMS to reimburse issuers ...” The request was an acknowledgement that HHS needs congressional appropriations to make the payments. Congress rejected the request, but the administration made the payments to insurers anyway.

Congressional attempts to provide statutory authority to administrative changes to the law

There have been numerous instances when the administration has made what many Members of Congress consider to be an illegal change to the law but a change with which many in Congress agree. Congress has attempted to pass legislation to give legal standing to the change but has been rebuffed by the administration. For example:

- *Employer mandate delay:* When the administration issued its blog post on July 2, 2013, announcing the employer mandate delay, the House of Representatives later that month passed legislation that would have given legal standing to the delay. But the White House issued a Statement of Administration policy saying that the president would veto the legislation if it were to reach his desk. The legislation, which passed the House with bi-partisan support to grant a legal delay of the employer mandate, never reached the president’s desk because it died in the Senate.¹¹
- *Keep your Health Plan:* Similarly, the House passed on November 15, 2013, with bi-partisan support the Keep Your Health Plan Act of 2013. It would have permitted health insurance companies to continue to offer individual coverage that was in effect as of January 1, 2013, even if the policies did not meet ACA requirements. The administration threatened to veto the legislation had it reached the president’s desk (which it did not), even though it would have codified a change made by the administration to permit states to allow insurers to renew non-compliant plans.¹²

Legislation which was enacted to provide statutory authority to changing the law

The administration has claimed it made the changes through regulation because Congress refused to consider legislative fixes. But the record proves that wrong. At least 17 changes to the law have been passed by both houses of Congress and signed into law by President Obama. Here are three examples:

- *CLASS Act repeal.* After extensive study, the Department of Health and Human Services concluded that the Community Living Assistance Services and Supports (CLASS) Act could not be self-sustaining as required by law. The CLASS Act was repealed on January 2, 2013.¹³ (The legislation called for creation of a Long-Term Care Commission, on which I served, that developed an extensive and impressive list of reform recommendations for Congress. Our report was issued on September 30 of that year.¹⁴
- *1099 repeal.* On April 14, 2011, Congress repealed the controversial 1099 reporting provision

that would have required businesses to report (on IRS Form 1099) whenever they pay a vendor more than \$600 for goods in a single year.¹⁵

- *Medicaid fix.* Couples earning as much as \$64,000 a year would have been able to qualify for Medicaid because of definitions of income calculations in the ACA. Congress saved taxpayers at least \$13 billion when it amended this provision on November 21, 2011.¹⁶

More changes revealed

We continue to discover new evidence that the administration is not following the statute in its implementation of the law. The latest example was uncovered by Prof. Andy Grewal of the University of Iowa College of Law.^{17 18}

1 Grace-Marie Turner, “Fifty Changes to ObamaCare...So Far.” Galen Institute, May 18, 2015. www.galen.org/newsletters/changes-to-obamacare-so-far/

2 Internal Revenue Service, “Transition Relief for 2014 Under §§ 6055 (Information Reporting), 6056 (Information Reporting) and 4980H (Employer Shared Responsibility Provisions),” Notice 2013-45, July 9, 2013, <http://www.irs.gov/pub/irs-drop/n-13-45.PDF>.

Coverage for some people under 100% FPL and for unlawful immigrants: The ACA provides tax credits to U.S. citizens with incomes between 100 and 400% of poverty, but IRS rules expanded the eligibility to extend the credits to citizens below 100% FPL in some cases.¹⁹

Also, Section 36B of the ACA grants credits to some non-citizens with low-incomes only if they are themselves lawfully present in the U.S. and cannot obtain Medicaid coverage. However, IRS regulations contradict the statute and allow subsidies if “the taxpayer *or a member of the taxpayer’s family* is lawfully present in the United States,” and “the lawfully present taxpayer *or family member* is not eligible for the Medicaid program.”²⁰

Health reform was needed, and people have received coverage

Our health sector definitely needed reform, especially to expand coverage to millions of people who had been shut out of insurance in the past. The Affordable Care Act has extended health insurance coverage to many people who needed insurance but could not afford it or obtain it because of pre-existing conditions. There was bi-partisan support in Congress when bills were being debated to achieve these goals, but instead of pursuing a bi-partisan solution, the Affordable Care Act was pushed through on a strictly partisan basis with unusual parliamentary maneuvers. This process did not leave Congress the usual ability to fix problems with the language in the Senate bill in conference.

The 50 changes already made to the law show that the law would have been difficult if not impossible to implement as it was written and passed. However, it is not the job of the administration to fix the law but to implement it as written. The U.S. Constitution requires the executive branch to seek new legislation, as it has done at least 17 times with the ACA, if changes to the law are needed. I would oppose these illegal administration actions no matter who

was in the White House because they undermine the rule of law.

Companies inside and outside the health sector have spent countless billions of dollars trying to comply with the ACA. When the administration makes what some call “minor temporary course corrections,” it causes a new cascade of disruption and expenses for companies and makes it even harder for them to comply not only with the law but with ever-changing regulations.

We have a process by which laws are to be enacted and changed, and that process has not been followed in implementing key provisions of the Affordable Care Act, as I have described here. I thank the committee for holding this hearing today to shed light on this issue. If our constitutional system of government is to survive, it must be based upon the rule of law.

The above was originally published at [GalenInstitute.org](http://www.galen.org) on May 20, 2015.
<http://www.galen.org/topics/galen-calls-for-strong-oversight-of-obamacare-implementation/>

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ENDNOTES

3 Federal Register 42159, <http://www.gpo.gov/fdsys/pkg/FR-2013-07-15/pdf/2013-16271.pdf>

4 Anna Gorman, “For Many Middle-Class Taxpayers On Obamacare, It’s Payback Time,” February 26, 2015. Kaiser Health News. <http://kaiserhealthnews.org/news/for-many-middle-class-taxpayers-on-obamacare-its-payback-time/>

5 Government Accountability Office, “Medicare Advantage: Quality Bonus Payment Demonstration Undermined by High Estimated Costs and Design Shortcomings.” GAO-12-409R: Published: March 21, 2012. Publicly Released: April 23, 2012.
<http://www.gao.gov/products/GAO-12-409R>

6 Department of Health & Human Services, Centers for Medicare & Medicaid Services, “Insurance Standards Bulletin Series – Extension of Transitional Policy through October 1, 2016.” March 5, 2014. <http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/transition-to-compliant-policies-03-06-2015.pdf>.

7 Congressional Research Service, “Implementing the Affordable Care Act: Delays, Extensions, and Other Actions Taken by the Administration.” March 3, 2015.
<http://fas.org/sgp/crs/misc/R43474.pdf>

8 CCIIO, CMS, HHS, “Loan program helps support customer-driven non-profit health insurance,” December 22, 2014. <http://www.cms.gov/CCIIO/Resources/Grants/new-loan-program.html>

9 Philip Klein, “Treasury Won’t Explain Decision To Make \$3 Billion in ObamaCare Payments,” February 26, 2015. Washington Examiner. <http://www.washingtonexaminer.com/treasury-wont-explain-decision-to-make-3-billion-in-obamacare-payments/article/2560739>

10 <http://www.cms.gov/About-CMS/Agency-Information/PerformanceBudget/Downloads/FY2014-CJ-Final.pdf>

11 Authority for Mandate Delay Act passed the House 264-161 on July 17, 2013, H.R. 2667. It would have codified the administration's announcement delaying the employer mandate and reporting requirements. Similarly, the House passed on that same date the Fairness for American Families Act 2510174 H.R. 2668 that would have delayed enforcement of the individual mandate by a year. Both died in the Senate.

12 Keep Your Health Plan Act of 2013 passed the House 261-157 on November 15, 2013. It would have codified the administration's action allowing continuation of non-compliant health plans beyond the statutory deadline.

13 Congressional Research Service, "Legislative Actions to Repeal, Defund, or Delay the Affordable Care Act," March 2, 2015. <https://www.fas.org/sgp/crs/misc/R43289.pdf>

14 Commission on Long-Term Care. "Report to Congress." September 30, 2013. <http://www.gpo.gov/fdsys/pkg/GPO-LTCCOMMISSION/pdf/GPO-LTCCOMMISSION.pdf>

15 Congressional Research Service, "Legislative Actions to Repeal, Defund, or Delay the Affordable Care Act," March 2, 2015. <https://www.fas.org/sgp/crs/misc/R43289.pdf>

16 *Ibid*

17 Andy S. Grewal, "Lurking Challenges to the ACA Tax Credit Regulations." May 2015. Publication pending. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2598317

18 Andy S. Grewal, "Another 'Glitch' with the ACA Tax Credit?" March 30, 2015. Yale Journal on Regulation. <http://www.yalejreg.com/blog/another-glitch-with-the-aca-tax-credit-by-andy-grewal>

19 Federal Register /Vol. 76, No. 159 /Wednesday, August 17, 2011. <http://www.gpo.gov/fdsys/pkg/FR-2011-08-17/pdf/2011-20728.pdf>

20 *Ibid*

'Forced Sale' Of Drugs Could Endanger Patient Safety – Guest Essayist: Grace-Marie Turner

Any "forced sale" of products would also be constitutionally questionable as an unprecedented intrusion into the marketplace because the government would be compelling a commercial transaction that does not involve a willing seller and a willing buyer. The innovator company could even face liability if patients were harmed by a drug provided to them by a generics company to whom it was forced to sell.

The 21st Century Cures project, led by Energy and Commerce Committee Chairman Fred Upton (R-MI) and Rep. Diana DeGette (D-CO), is an extraordinarily important endeavor that recognizes the need to modernize our regulatory structure if we are to achieve the major promises of 21st century medicine.

“If we want to save more lives and keep this country the leader in medical innovation, we have to make sure there’s not a major gap between the science of cures and the way we regulate these therapies,” the House Energy and Commerce Committee explains. “We are looking at the full arc of this process – from the discovery of clues in basic science, to streamlining the drug and device development process, to unleashing the power of digital medicine and social media at the treatment delivery phase.”

Over the last year, the committee has gathered recommendations from expert witnesses and consumers around the country during dozens of working sessions and round tables, and has worked hard to garner bi-partisan support for the plan. The first committee mark-up session is scheduled for tomorrow, and Chairman Upton hopes to get a bill to the floor early this summer. We will examine in a subsequent post the many good provisions of the legislation, but one stands out that the committee would be well advised to avoid.

The controversial provision is referred to as “forced sale,” and it strikes at the heart of patient safety.

Here is the back story: In 2007, Congress gave the Food and Drug Administration authority to work with drug developers to develop Risk Evaluation and Mitigation Strategies (REMS) programs to help manage drugs with known, potentially serious risks, such as organ damage, serious infection, or birth defects. The strictest REMS protocols could require the developer to keep a registry of all patients taking the drug, to certify all prescribers and dispensers of the drug, to counsel patients to assure compliance with the protocols, or restrict distribution in the interest of patient safety.

Generic drug manufacturers want the Energy and Commerce Committee to include in the Cures legislation a new requirement for high-risk drugs that have distribution restrictions. The proposal would force innovator companies to sell their drugs to generic competitors without imposing similar safety obligations on them.

The drug thalidomide is an example of a drug with a strict REMS protocol. Thalidomide was given to pregnant women, primarily in Europe in the 1950s, to alleviate morning sickness but was found to be responsible for several thousand serious birth defects. Thalidomide led to public demands that drug companies demonstrate a drug’s safety before it could be introduced into the market.

Half a century later, after extensive clinical trials, thalidomide was found to be an important therapy for patients with multiple myeloma by impeding the growth of cancerous cells and reducing their ability to crowd out healthy cells. The drug was allowed onto the U.S. market, but a strict REMS program was required by the FDA to guard against any risk of fetal

exposure. The REMS program requires a patient registry, a negative pregnancy test for women of child-bearing age prior to dispensing, counseling for both men and women about using multiple forms of birth control, and certification for prescribers and dispensers.

Thalidomide, which was developed by Celgene **CELG** -0.58%, is not alone as a high-risk drug with restricted distribution. Small molecule drugs such as Vivus' Qsymia for weight loss, and Jazz Pharmaceutical's Xyrem for narcolepsy (commonly referred to as GHB, its chemical abbreviation or the "date rape" drug) have REMS with restrictions on distribution, as do newer biological drugs like Tysabri, Biogen's blockbuster multiple sclerosis therapy, or Alexion's Soliris, a unique treatment for ultra-rare disorders.

As the patents on these drugs reach expiration, other companies seek to develop generic versions, and they need samples for testing in order to develop their copies. Rather than going through wholesalers or other conventional channels as they would with ordinary drugs and biologics, a generic manufacturer has to negotiate the terms of sale with the innovator company. These marketplace negotiations involve discussions not just about the price and quantity, but also whether the generic manufacturer can follow protocols to ensure patient safety.

Generic drug companies argue that innovator companies use REMS programs to make it difficult or impossible to acquire drug samples, thereby slowing generic drug development. They say Congress should compel companies to sell their drugs to any interested generic company, accelerating market entry of the generic copies and leading to cost savings on drug spending for patients in Medicare and other government programs.

But high-risk drugs are being bought and sold now between innovators and generic companies. Of the 40 drugs with the most restrictive requirements to follow REMS protocols, more than half either have been sold to generic companies or a new generic drug application has been filed. Indeed, the system seems to work as the REMS law intended.

And, there are other safeguards in place. The federal law authorizing REMS programs expressly bars innovative companies from using REMS restrictions to block generic competition. And the FDA has recognized the need for special safeguards regarding high-risk REMS drugs by issuing detailed guidance last December to help support the sale of these drugs to generic companies. Congressional intervention would override the FDA's balanced protocols. For the remaining drugs, existing laws and regulatory structures are in place for disputes between generic and innovator companies. The FDA can use its new guidance and also encourage both parties to arrive at a contractual agreement. If necessary, the FDA can refer the dispute to the Federal Trade Commission (FTC), which has well-established mechanisms mandated by Congress to deal with unfair restraint of trade.

Any "forced sale" of products would also be constitutionally questionable as an unprecedented intrusion into the marketplace because the government would be compelling a commercial transaction that does not involve a willing seller and a willing buyer. The innovator company could even face liability if patients were harmed by a drug provided to them by a generics company to whom it was forced to sell.

Innovators do not choose REMS programs. If one of these high-risk drugs is going to be

marketed, the REMS program is required by the FDA, and the protocols are reviewed annually. Forcing the sale of these drugs to companies that cannot assure patient safety with such complex products would endanger public health.

If another thalidomide baby were to be born, the FDA would surely pull the product from the market – at least for a time – and cancer patients who need the drug would be denied access to this important therapy. Patients would be harmed, and another miracle drug would be lost.

Forcing brand name companies to sell their drugs to generics companies also would reduce incentives for future drugs to be developed.

The 21st Century cures project offers a wealth of positive ideas. It would be unfortunate if the committee were to include this forced-sale provision without a complete congressional examination of the many potential adverse consequences for innovation and drug safety.

The above was originally published at [Forbes.com](http://www.forbes.com/sites/gracemarieturner/2015/05/13/forced-sale-of-drugs-could-endanger-patient-safety/) on May 13, 2015.

<http://www.forbes.com/sites/gracemarieturner/2015/05/13/forced-sale-of-drugs-could-endanger-patient-safety/>

Grace-Marie Turner is president of the Galen Institute (galen.org), a non-profit research organization focusing on market-based health policy solutions.

Treasury Department Overreach? – Guest Essayist: Tony Williams

The Treasury is not simply executing its task of printing money for legal tender and updating its design to thwart counterfeiters. It is pursuing an ideological agenda outside of its authority.

In June, 2015, the Obama administration imposed its progressive vision when Treasury Secretary Jack Lew announced that a woman would replace the first Secretary of the Treasury Alexander Hamilton on the \$10 bill. While very few Americans object to having important women on the nation's currency, the Treasury is overreaching beyond its prerogatives which are guided by its broader progressive objectives.

There was an attempt over the past year to remove Andrew Jackson from the \$20 bill. This initiative failed prior to a new executive decision was made to remove Hamilton from the \$10 bill. Both

Many of Hamilton's supporters on the op-ed pages and blogs have wrongly taken the stand that Jackson should be dumped before Hamilton. Hamilton's defenders have argued that Jackson is the unsavory character from American history who has to go.

Jackson was a slave owner who strongly supported the slave system of the South. He ordered the removal of the Cherokees that led to the tragic "Trail of Tears" resulting in the death of thousands of Native Americans. Even the wave of "Jacksonian democracy" that ushered in

universal male suffrage has been criticized for not including women or African Americans. Finally, he vetoed the Second Bank of the United States and killed the institution.

But, savaging this war hero and president is not the best way to defend Alexander Hamilton and keep the founding father on the \$10 bill. As we'll see, the argument inadvertently buttresses the progressive view. Progressives want to get rid of the white men on the currency because they owned slaves, are perceived to be racists, or don't pass similar litmus tests.

Washington, Jefferson, and Lincoln would all fail these tests. Even the progressive New Dealer FDR (who is on the dime) failed to support an anti-lynching bill in Congress and would risk being removed according to the logic.

Instead of attacking Jackson and the others, supporters of Alexander Hamilton should defend him because of his merits. He was a successful immigrant who was a true rags-to-riches story. He rose on his merit to become Washington's most trusted aide during the Revolutionary War. Hamilton continually argued for a stronger central government to replace the Articles of Confederation. He participated in the Constitutional Convention and played an even more important role in its ratification, writing most of the *Federalist Papers* and winning ratification in the key state of New York. He almost single-handedly started the American economy by establishing the national credit and creating the National Bank. At the risk of making it seem as if he passed a litmus test, Hamilton was a dedicated anti-slavery activist. During the American Revolution, he supported John Laurens' plan to give slaves their freedom and arm them in South Carolina. Hamilton was also a founder of the New York Abolition Society.

The facts of his life support keeping Hamilton on the \$10 bill but there is another issue. The attempt to replace Jackson and now Hamilton is part of a larger scheme of using executive agencies and departments to achieve certain progressive goals. In this case, the decision at the Treasury seemed motivated by an attempt to remove "dead white males" in favor of what Lew said were examples of "champion[s] for our inclusive democracy" such as Harriet Tubman.

When he introduced the controversial proposal to the public, Lew asserted that it would "make a statement about who we are and what we stand for." He saw it as "an occasion to take stock of where we are as a nation and where we're going." The change in the money is his attempt to introduce a moment for intense self-reflection about whether or not Americans have always lived up to our "democratic values."

The administration is trying to rectify past discrimination against minority groups with a symbolic change. The Treasury also wants to reverse previous failures to include women such as Sacagawea and Susan B. Anthony on dollar coins which proved terribly unpopular and were quickly withdrawn. No one wanted to carry them because they looked too much like quarters or involved awkward situations at stores about whether they would be accepted. The only alternative left is to remove some great men from the paper currency.

The Treasury is not simply executing its task of printing money for legal tender and updating its design to thwart counterfeiters. It is pursuing an ideological agenda outside of its authority. The words of Representative Jeanne Shaheen, who introduced legislation in April to change the \$10

bill, represents the agenda. “Young girls across this country will soon be able to see an inspiring woman on the ten dollar bill.” Girls apparently cannot be inspired by the actions and words of great men and need to see someone of the same sex on the money. Now, the Treasury of the United States is somehow responsible for including images of inclusive democracy and ensuring that young people possess self-esteem. The noble attempt to honor great women for the wrong reasons has resulted in executive overreach.

Tony Williams is the author of five books including Washington and Hamilton: The Alliance that Forged America.

Another ACA Treasury Regulation That Lacks Statutory Authority – Guest Essayist: Grace-Marie Turner

New research about implementation of the Affordable Care Act finds that Obama administration regulations are allowing taxpayer subsidized health insurance for some people earning less than the statutory income floor and also for unlawful immigrants.

A new study by Andy S. Grewal, an associate professor at the University of Iowa College of Law, explains that the ACA provides tax credits to U.S. citizens with incomes between 100 and 400% of the Federal Poverty Level (FPL). However, IRS regulations were written to extend credits to citizens below 100% FPL in some cases.

Also, Section 36B of the ACA grants credits to some non-citizens with low-incomes only if they are themselves lawfully present in the U.S. and cannot obtain Medicaid coverage. IRS regulations, however, contradict the statute and allow subsidies if “the taxpayer *or a member of the taxpayer’s family* is lawfully present in the United States,” and “the lawfully present taxpayer *or family member* is not eligible for the Medicaid program.”

The regulations were issued on August 17, 2011, but the discrepancy between the law and the regulations was carefully documented in a post by Grewal on Bloomberg BNA, “Lurking Challenges to the ACA Tax Credit Regulations.”

“A Treasury regulation that extends premium tax credits to individuals whose household incomes fall below the floor established by Section 36B(c)(1)(A) lacks statutory authority,” Grewal concludes. “Another Treasury regulation that extends those credits to some unlawful aliens suffers from a similar infirmity.”

He highlights “the pitfalls associated with Treasury’s failure to recognize limits on its administrative authority.” That is the core issue before the U.S. Supreme Court in *King v Burwell* where King *et al* are challenging an IRS rule that allows tax credits to flow through federally-facilitated health insurance exchanges, contrary to the language of the statute which allows the credits only through state exchanges (article originally published May 28, 2015).

Only to people earning between 100 and 400 percent of FPL are eligible for premium tax credits under the ACA, but Treasury extended the definition in its 2011 rule to also allow credits

for those whose income falls below 100 percent. Further, “These taxpayers are generally given larger credits than are given to those who actually meet the statutory criteria,” Grewal writes.

And taxpayers who get a larger subsidy than they were due because they mis-estimated their income do not have to repay the money. “The regulation allows a taxpayer to fully keep her tax credits even if, at the close of the taxable year, the taxpayer’s household income did not meet the statutory floor and the taxpayer was not entitled to any credits.”

Grewal says it is clear that the regulations contradict the statute, saying, “the statute leaves no room for interpretation,” and the regulation “contradicts the congressionally prescribed criteria.” This “reflects an impermissible interpretation of the statute,” he writes.

Citizens who submitted comments on the proposed regulations asked Treasury to allow similar flexibility for those earning more than 400 percent of FPL. Treasury’s answer: No, because that would be “contrary to the language of section 36B.”

“In other words,” Grewal writes, “the Treasury thinks that it’s ambiguous whether a taxpayer at the 99 percent level comes within the 100-400 percent statutory range but that a taxpayer at the 401 percent level unambiguously exceeds it.”

Grewal’s conclusion: “Nothing in Section 36B allows the Treasury to rewrite the criteria for qualifying as an applicable taxpayer,” including stretching the income eligibility beyond statutory bounds.

But the illegal regulations don’t end there: “Treasury regulations, however, expand the statute and provide tax credits to individuals not lawfully present” in the United States. “Unlike very low-income citizens, whom Congress thought would obtain Medicaid coverage, some low-income lawful aliens may enjoy premium tax credits under Section 36B.”

However, a special Treasury rule expanded the definition beyond *individual* to allow subsidies if a “*taxpayer or a member of the taxpayer’s family* is lawfully present in the United States,” and “the lawfully present taxpayer *or family member* is not eligible for the Medicaid program.” The italicized language, not found in the governing statute, allows the lawful status of a family member to qualify an unlawful alien as an applicable taxpayer.

Once again, the statute “does not present an interpretive gap for the Treasury to fill,” Grewal writes. “In precise terms, Congress crafted a special rule that treats an alien whose household income falls outside of the statutory range as an applicable taxpayer only if the alien himself enjoys lawful status, and it specifically denied credits to dependents.”

Grewal’s conclusion: “Literally speaking, the regulation allows unlawful aliens to obtain tax credits,” he writes. “Current regulations reflect a desire to implement the ACA as the Treasury thought it should have been drafted, rather than as it was drafted.”

The Galen Institute has been cataloguing the major changes made to the ACA. Prof. Grewal’s newly-uncovered finding represents change #50 but is #3 on our list because the obscure

regulation was issued the year after the law's passage. It is the 31st change made by the administration without statutory authority.

The above was originally published at [Forbes.com](http://www.forbes.com/sites/gracemarieturner/2015/05/28/treasury-rule-allows-taxpayer-subsidized-health-insurance-for-illegal-immigrants/) on May 28, 2015.

<http://www.forbes.com/sites/gracemarieturner/2015/05/28/treasury-rule-allows-taxpayer-subsidized-health-insurance-for-illegal-immigrants/>

Grace-Marie Turner is president of the Galen Institute (galen.org), a non-profit research organization focusing on market-based health policy solutions.

What's In a Name? The Controversy over the Washington Redskins – Guest Essayist: Tony Williams

In the late nineteenth and early twentieth centuries, the progressives created numerous agencies in the executive branch of government that were supposed to bring more rationality, efficiency, and order to American society. They were to be run by scientific experts who would oversee a civil service bureaucracy that would govern objectivity as they made decisions free of politics and partisanship.

Over the course of the twentieth century, the administrative state grew rapidly and regulated nearly all aspects of American life. While politics was never far from the surface and coincided with the party that controlled the White House, the executive agencies of most administrations preserved a broad measure of objectivity.

The attempt by the current administration to force a change in the name of the Washington Redskins demonstrates that the executive bureaucracy is presently pursuing an ideological and partisan agenda in a blatant example of executive overreach. Why are so many agencies involved in a dispute over the name of a professional football team that has been around for decades? The overreach in this case is driven by a modern progressive ideology that seeks to impose its vision for an America where no one is offended. This is accomplished through executive agencies rather than popular politics or voluntary action.

Over the last couple of years, the administration has waged a full-court press against the Washington Redskins because the name is perceived as racist or offensive. The controversy started in the unlikeliest of places – the U.S Patent and Trademarks Office. The Patent Office might seem to be the most scientific and unpolitical part of the executive branch where bureaucrats examine the inventions of tinkerers and scientists. Nevertheless, it entered the fray over the name and cancelled the team's trademark in June of 2014. Although it was more of a symbolic act that did not affect hundreds of millions of dollars in merchandizing, it was a remarkable decision that set off popular ire on social media.

At the same time, the Federal Communications Commission considered banning the team name from any broadcasts and threatened to block renewal of federal licenses to any stations that continued to use the name. FCC Chairman Tom Wheeler thought the name was so offensive and

inappropriate that he could not bring himself to utter it, calling the team “the Washington football club.” Some football announcers followed this example on broadcasts that were met with popular ridicule. The FCC wanted to ban the name because it was “indecent” and considered several petitions to ban the name because it was “obscene.” But it later ruled against the obscenity accusation because it had to admit that the name did not meet the official definition.

Not to be outdone, the National Park Service, under the Department of the Interior, which owns the land under RFK Stadium where the Redskins formerly played, joined the other agencies in the crusade when it refused to grant the District of Columbia a new lease for the Redskins possibly to return from FedEx Stadium in Maryland. Interior Secretary Sally Jewel interjected her personal views that the name was “a relic of the past” and that she was “uncomfortable with the name.” A new stadium will not be approved by the current administration for its duration unless the name is changed, but the next possible renewal will occur long after the administration leaves office.

Even President Barack Obama has commented on the controversy. Without any direct authority over the name, he asserted back in 2013, that if he were one of the owners, he would “think about changing” what he argues is an offensive name. Clearly, his administration is working hard to achieve that goal.

Just yesterday, a federal district court upheld the U.S. Patent Office withdrawal of the trademark. The Washington Redskins plan to appeal the decision. The decision reinforces NCAA pressure to change college team names with Native Americans on them in favor of a variety of animals and mythological figures. For example, the College of William and Mary near my home changed their name from the Tribe to the Griffins.

The question remains why so many federal executive agencies are leading the organized campaign to remove a mascot from an NFL team.

Tony Williams is the author of five books including Washington and Hamilton: The Alliance that Forged America.

Immigration Reform And Executive Orders: Imperfect Together – Guest Essayist: Will Morrissey

Properly used, executive orders form an indispensable part of any government, including our own. If Congress passes a law and the president signs it, the president undertakes a Constitutional obligation to execute the law. In so doing, he is likely to need to tell his administrators what to do and, at least to some extent, how and when to do it. Thus the president is constitutionally obligated to enforce immigration law and is fully entitled to issue executive orders in the course of fulfilling that obligation.

Many current problems with immigration have arisen because recent presidents have preferred to complain about U. S. immigration laws themselves, instead of enforcing them. They do indeed have a lot to complain about. But that is no excuse to refuse to enforce the laws that now exist,

either passively—by simply failing to follow them—or actively—by issuing executive orders that contradict them. Last I looked “illegal immigration” meant immigration that’s against the law, and I for one wouldn’t mind seeing a bit more respect for duly-enacted laws of the land. As Abraham Lincoln said, repeatedly—from his Lyceum Address in 1838 through his first Inaugural Address of 1861—even unjust laws are laws, and he who breaks them encourages a spirit of lawlessness that may bite the hand that feeds it.

Part of the problem we face stems from our (now) rather hazy way of conceiving immigration law. Let’s back up for a moment and consider the strengths and the dangers of the American understanding of immigration—*legal* immigration. For most countries, immigration is a fairly straightforward matter. If I am Russian and you are not, I will let you into my country, or not, depending upon whether I regard your existence there to be in the best interests of the Russian nation, as defined by the government of Russia (including its state-controlled church). Thank you. To be sure, this doesn’t make immigration go away, as a practical problem. Many countries find themselves overwhelmed by refugees from war or famine; some (Russia included) find themselves vexed by ‘foreigners’ who were incorporated during an earlier period of imperial conquest. But at least in principle, the doctrine of modern nationalism settles the issue by defining immigration as a matter of national self-interest, often defined not merely in economic but in linguistic, religious, and ethnic terms.

From the founding on, the Americans understood the matter quite differently. If all men are created equal, endowed by their Creator with certain unalienable rights to life, liberty, and property, then nationalism cannot sit at the core of American law. With respect to immigration, we cannot say to those who want to join us in citizenship: “We don’t want you because you are French, Irish, Chinese, Iranian and not American.” Mere ethnicity can be no bar to residence or citizenship in the United States, a country founded on resolutely non-ethnic principles.

On the other hand, America is entirely *unexceptional* in claiming the right to control its own borders, on the following grounds: By organizing ourselves into a political society dedicated to the proposition that all men are created equal, we have drawn geographical boundaries around a moral idea. That is, in our first century after independence we bought and conquered our way from sea to shining sea on the foundation of a moral idea—human equality of unalienable natural rights. By staking out this territorial claim under a republican regime that distinguished ourselves from other countries, which occupied different parcels of the earth and often at the service of very different principles and ruling themselves under different regimes. Our right to secure boundaries issues not from ethnic identity—by eighteenth-century standards, we were already a somewhat mongrel lot, and things have only gotten wilder since then—but from the very right to security itself, that is, from the obligation of governments (as the Declaration of Independence puts it) to *secure* the rights with which every human being has been endowed. We have paid to defend those universal rights in this particular place: our two civil wars (1775-1781 and 1861-1865), two world wars (three, counting the wars of the Cold War, and four, counting the wars against jihadists and their sponsors).

This willingness to enunciate and to defend natural, human rights in a practical way—within a physical territory, against enemies foreign and domestic—has contributed not only to political freedom in the world but to our own prosperity. The nation of immigrants has been the nation of

willing workers and patriotic citizens; since our founding, immigrants have taken the hardest, dirtiest, and lowest-paying jobs precisely because they knew they would sooner or later be recognized in American law what they already were by nature but were not in their native countries: rights-bearers.

With these great advantages came a serious problem. Being geographically limited, being finite, the United States can no more permit all human beings to come here than any other country can—if any other country wanted to. This obvious fact has forced American legislators from the founding generation to now to seek limits to immigration consonant with our universal moral principles. By necessity, we must put reasonable limits on a principle unlimited by any category other than that of “humanity.”

A good example of this was the American approach to Chinese immigration following the Civil War. In 1868, the United States and China signed a treaty stipulating, among other things, that “the United States of America and the Emperor of China cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects respectively from one country to the other, for purpose of curiosity”—we’d call it “tourism,” now—“of trade, or as permanent residents.” On the other hand, both countries understood that America and China were different countries, with different languages, customs, habits; neither would be permitted to overwhelm the other by sheer population transfer. Then as now, there were a lot of Chinese. As for the Americans, had they not overwhelmed the North American Indian tribes and nations with exactly such a demographic strategy?

By the early 1880s, over 100,000 Chinese had emigrated to the United States—a then-substantial number of persons who had no experience in ‘working’ a political regime of republicanism. As my Hillsdale College colleague Adam Carrington has written in a recent article in the *Journal of Supreme Court History*,^[1] Justice Steven J. Field argued that border control rested in the national police power—a power inherent in any government that seeks to protect the lives and property of its citizens. Ignoring then-common claims based on ethnicity or race, Field observed that the Chinese “retained the habits and customs of their own country.” Some Chinese were welcome, but “vast hordes of people crowding in upon us” threatened “the right of self-preservation” and therefore justified invoking the police power of the United States to control the influx and thus to affirm the sovereignty of the American people over their own country.

Current confusions bedeviling American immigration policy stem from obscuring the foundations of the American regime itself. If the American people are sovereign on American territory, and if that sovereignty itself defers to the laws of nature and of nature’s God, then Americans will not ban any would-be immigrant on the basis of such morally relevant categories as race, national origin, or religion—at least insofar as the latter does not command acts in violation of those natural laws. If, however, the American people enact laws with which to govern admission to the territory over which they enjoy sovereignty, on such morally and politically legitimate terms, then it is the obligation of other countries to respect those laws and for elected officials to obey them until such time as they may be changed by ordinary legislative processes. To attempt to change or abolish such laws *de facto* by executive fiat strikes at American constitutionalism—the very legal foundation that protects the rights of person

and property rights that make America attractive to would-be immigrants in the first place, and livable to those of us who are already here.

One thing else ought to be clear. Enacting laws for immigration must be an act of the national legislature and the president, given the supreme importance of such law. Immigration law determines not only the number but also to some extent the character of the people who will join us in fellow-citizenship. It is no matter for one branch of government alone, any more than are the laws governing the civic education of new immigrants and their children.

Will Morrissey holds the William and Patricia LaMothe Chair in the United States Constitution at Hillsdale College; his books include Self-Government, The American Theme: Presidents of the Founding and Civil War and The Dilemma of Progressivism: How Roosevelt, Taft, and Wilson Reshaped the American Regime of Self-Government.

[1] Adam Carrington: “Police the Border: Justice Field on Immigration as a Police Power.” *Journal of Supreme Court History*, Volume 40, Number 1, March 2015, pp. 20-37.

Saxton v. FHFA – Have FHFA And The Treasury Exceeded Their Limited Authority Under HERA? – Guest Essayist: Logan Beirne

Earlier this month, a new front was opened in the legal campaign by investors against the federal government’s (mis)management of mortgage giants Fannie Mae and Freddie Mac. In the latest salvo, *Saxton v. Federal Housing Finance Authority (FHFA)*, individual investors from Iowa filed suit to stop the government from syphoning private property into the U.S. Treasury’s coffers. This most recent litigation effort seeks to reign in the federal government as it subverts the rule of law.

Like every major financial firm in the U.S., Fannie and Freddie found themselves in acute financial distress during the financial crisis of 2007-2008. A root cause of this crisis was the collapse of the real estate market, which caused record mortgage defaults. This, in turn, made investors unwilling to buy the securities that Fannie and Freddie sold. At the height of the crisis the federal government moved in and bailed out both, injecting over time approximately \$117 billion into Fannie, and \$70.5 billion into Freddie, receiving in return rights to own 79.9% of the companies’ common shares – with the remainder in private hands.

Freddie and Fannie returned to profitability during the second quarter of 2012. Soon thereafter in August 2012, the government changed the terms of the bailout to “sweep” all of Fannie and Freddie’s profits back to the Treasury in the form of dividends – effectively making the companies’ debt infinite and wiping out the private shareholders. Against the bailout of \$187.5 billion, Washington recouped over \$228 billion from Fannie and Freddie by early 2015.

Unsurprisingly, the remaining shareholders sued, arguing that the government was supposed to return the mortgage giants “to a sound financial condition,” not divest them of all assets. There have been setbacks. Notably, last fall, Fairholme and Perry were dismissed by Judge Lamberth of the U.S. District Court for the District of Columbia, thereby sustaining the 2012 full dividend

“sweep.”

But this is far from the end of the legal battle. Perry Capital appealed the ruling while Fairholme Funds remains in discovery at the U.S. Federal Claims Court. And the new Saxton suit injects additional vigor into the challenge.

In a carefully articulated complaint, Iowa investors Thomas Saxton, Ida Saxton, and Bradley Paynter claim that the FHFA and Treasury a) systematically exceeded their limited authority under the *Housing and Economic Recovery Act (HERA)*, b) acted arbitrarily and capriciously, beyond the normal standards of administrative law, and, c) breached good faith and contractual obligations to the private shareholders of Fannie and Freddie.

Unlike earlier suits, many of which focused on constitutional claims, the Saxton complaint astutely focuses on FHFA’s statutory breaches – in particular the unprincipled actions in excess of the authority conferred by HERA. Although Fannie and Freddie were never necessarily insolvent, HERA sought to stabilize the unprecedented turbulence in the housing market. Accordingly, FHFA used authority under HERA to send the two companies into conservatorship.

Via this route, the FHFA believed it would be able to avoid challenges from shareholders that it was confiscating private wealth. As conservator, the FHFA’s duty is to conserve the companies’ assets for the benefit of the common and preferred shareholders with the expectation that the companies will return to sound condition in the future. Specifically, under section 1145 of HERA, the FHFA may “take such action as may be — (i) necessary to put the regulated entity in a sound and solvent condition, and (ii) appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity.”

However, rather than work as conservator to benefit Fannie Mae and Freddie Mac’s shareholders, as is its obligation under traditional conservatorship law, the FHFA acted for the benefit of the U.S. government – and to the detriment of those private shareholders. In a surprise deal, the FHFA effectively wiped out the private shareholders and essentially turned the proceeds of Freddie and Fannie to the U.S. Treasury.

When asked about mortgage giants Fannie Mae and Freddie Mac, Melvin Watt, director of the FHFA, said “I don’t lay awake at night worrying about what’s fair to the shareholders.” Flaunting his legal responsibilities, Watt continued, “My responsibility is to think about how can I do what is responsible for the taxpayers.” This is fundamentally the wrong approach.

As conservator under HERA, it is precisely the FHFA’s responsibility to work for the benefit of the shareholders. Under standard corporate law principles, that conservator is bound, by a strong fiduciary duty to protect the corporate assets for the benefit of both common and preferred shareholders. By working for the benefit of third party taxpayers – and to the detriment of private shareholders – the FHFA is in breach of its duties under HERA.

The courts have another chance to get things right this time around. Saxton provides another forum in which to correct where the U.S. District Court for the District of Columbia likely went wrong last fall.

Although the political winds of the moment may make it seem popular to seize these assets and ignore the claims of Fannie and Freddie's shareholders, we cannot lose sight of the longer term ramifications. The precedent set by the FHFA is contrary to prior practice, will make long-term private sector investing a riskier proposition and will make capital access for housing less accessible, not more.

Saxton provides another opportunity to block the federal government from stripping private citizens of their assets to achieve its own political objectives.

Political expediency should not flout the rule of law.

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<http://www.natlawreview.com/article/saxton-v-fhfa-have-fhfa-and-treasury-exceeded-their-limited-authority-under-hera>

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Untried Weapons – Repairing The Tattered Remains Of A Constitution That Has Not Been Tried And Found Wanting, But That Has Been Found Difficult; And Left Untried (Part 1)* – Guest Essayist: David Eastman

This essay is the first in a series inspired by federal overreach in Alaska. The series explores briefly why the Constitution is ineffective at constraining federal officials today, and evaluates two largely untried and fundamentally different approaches to restoring constitutional constraints; issue-based legislative accountability and a convention of states to amend the United States Constitution, both of which claim support from the Constitution and America's Founding Fathers.

At the outset of the Constitutional Convention, George Washington rose and declared to each of his fellow delegates "If, to please the people, we offer what we ourselves disapprove, how can we afterwards defend our work? Let us raise a standard to which the wise and the honest can repair. The event is in the hand of God."^[1]

On January 25th of this year, the 44th President of the United States directed executive branch agencies to begin managing 22 million acres in Alaska—an area larger than the State of South Carolina—as off limits to development, directly in the face of federal law which states that there will be no further executive branch action withdrawing more than five thousand acres of public land within the State of Alaska without an act of Congress. In an era of highly polarized partisan politics it is a rarity indeed for every single elected member of a state legislature to vote in 100% agreement on an issue. The withdrawing of additional resources from Alaska by the federal government is one such issue. The current vote in the Alaska Legislature on this issue is 60–0.

With passage of the Alaska National Interest Lands Conservation Act in 1980, Alaskans were promised that no more land would be taken by the federal government. In exchange, Alaska agreed to the designation of more permanent wilderness land in Alaska than in all other parts of the United States combined. For Alaskans, this issue is a deeply personal one, and ties directly to the question of Alaskan statehood and whether or not Alaska's status in the union will from this point forward be better characterized as a state, a colony, or a U.S. territory. While conflicts over Alaska's wilderness will not often make the evening news in Miami or Boston, how to respond to an overreaching federal government is a question for Americans in Boston just as it is for Americans in Texas and Alaska. The question is no longer whether or not the federal government has overreached the limits placed on it by the Constitution. The question now is what to do about it.

In recent years, Republicans, Democrats and Independents have all been elected to state office in Alaska after making public commitments to limit federal overreach in The Last Frontier State. Accordingly, a wide variety of strategies to limit federal overreach have recently found support in the Alaska Legislature. In addition to joining other states in lawsuits against the federal government, Alaska has also passed legislation declaring federal gun laws unconstitutional and unenforceable within its borders, legalized marijuana, nullified provisions of the National Defense Authorization Act, prohibited state participation in the REAL ID Act / National ID program, established a legislative committee focused exclusively on federal overreach, committed Alaska through the Compact for America to the pursuit of a national convention to amend the US Constitution to fix the national debt, and called upon Congress to convene a convention of states for the purpose of amending the US Constitution for the purpose of limiting the power and jurisdiction of the federal government.

Currently pending before the Alaska Legislature are additional proposals seeking support to amend the US constitution, including an effort to call for an amendment to overturn the Supreme Court case *Citizens United v. FEC*, and an effort to petition Congress to call a convention to propose a Countermand Amendment to rebalance the relationship between states and the federal government. Traditional approaches to politics are being challenged today by the desire to try things that haven't already been tried before, and changing the Constitution is often listed among them. Changing the United States Constitution has lately captured the imagination of Americans all along the political spectrum, from retired Supreme Court Justice John Paul Stevens on the left to author and conservative radio talk show host Mark Levin on the right—and it is not too hard to see why. Our Republic is undergoing change, and the Constitution with it; not the words of course, but the way in which the various branches of the federal government approach those words. Those who fancy these changes are eager to speed up the process, and those opposed to the changes are just as keen to put an end to them.

David Eastman is a graduate of West Point and a former Captain in the United States Army. He has served at all levels of government; city, county, borough, state and federal, and in each case was obliged to take an oath to support and defend the U.S. Constitution; He is a former Lincoln Fellow with the Claremont Institute for the Study of Statesmanship and Political Philosophy, and a John Jay Fellow with the John Jay Institute for Faith, Society and Law. He is a co-founder of Tax Our Kids, which advocates for sustainable government spending on behalf of Alaska's

children. He lives with his family in Wasilla, Alaska.

- [*] The American Chesterton Society, “*What’s Wrong with the World*”, 1910
 [1] Max Farrand, ed., *The Records of the Federal Convention of 1787*, rev. ed., 4 vols. (New Haven, Conn.: Yale University Press, 1937), 3:382. (1787.)

Untried Weapons – Repairing The Tattered Remains Of A Constitution That Has Not Been Tried And Found Wanting, But That Has Been Found Difficult; And Left Untried (Part 2) – Guest Essayist: David Eastman

This essay continues a series exploring briefly why the Constitution is ineffective at constraining federal officials today, and highlighting two largely untied and fundamentally different approaches to restoring constitutional constraints, both of which claim support from the Constitution and America’s Founding Fathers.

The Constitution in Tatters

As a document setting effective limits on the power of the federal government, the Constitution today lies tattered and worn, each article a testament to a battle lost and a fortification overrun (or bypassed) on the way to the consolidation of power in Washington. Some beginning students of the Constitution today are perplexed and genuinely wonder how it could be that a document that reads: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people” can today have nearly the same effect as if the Framers had instead decided “the powers not delegated to the States by the Constitution will be reserved to the federal government.” Beginning students are particularly prone to reason that if it is simply written in the Constitution, and the Constitution is the supreme law of the land, it must be so, and that’s all there is to it.

Admittedly, there is a certain force to this line of reasoning. However, the Framers were under no such illusions. The Federalist Papers offer us a picture of the amount of trust they placed in a written constitution alone to restrain our nation’s officials:

“Will it be sufficient to mark, with precision, the boundaries of these departments, in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power? This is the security which appears to have been principally relied on by the compilers of most of the American constitutions. But experience assures us, that the efficacy of the provision has been greatly overrated...” — Federalist #48

“...a mere demarcation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.” —Federalist #48

“...nations pay little regard to rules and maxims calculated in their very nature to run counter to the necessities of society.” — Federalist #25

“...mere declarations in the written constitution are not sufficient to restrain the several departments within their legal rights.” — Federalist #49

As the Constitutional Convention ended and delegates filed out of Independence Hall in 1787, Elizabeth Willing Powel asked Benjamin Franklin what type of government the convention had given us. His aphorism: “A republic – if you can keep it” was not an idle quip. The Constitution was not designed to make liberty and self government easy, but simply to make it possible. That was the miracle that the Framers had commended to the hand of Providence.

Fast forward to today. The Constitution hasn’t changed much, but the way we look at it has. In a time of relative prosperity, when individuals today can obtain insurance for nearly every type of human endeavor, the Constitution stands as something of an oddity. When we as Americans look around for an insurance policy against abuse of power in government, the Constitution is the best we’ve got—but as an insurance package it is woefully inadequate, and always has been. The Framers never contemplated that one could purchase insurance for the rights and freedoms that we have long treasured as Americans, nor did they think of the Constitution as a self-sufficient automated defense system against government abuse. Contrary to the expectations of a languid public, they did not intend for it to stand as a Maginot Line to intimidate and ward off future advances upon liberty. No mere words on parchment are capable of such a feat because no document can itself contain the moral reasoning with which it will be interpreted, or possess the means of its own defense when the document itself comes under attack.[\[i\]](#)

Thinking of the Constitution as an automated missile defense system may have a certain appeal today in that it puts the responsibility for guarding liberty, not on average Americans, but instead on a much smaller number of experts whose role is to service and provide maintenance for the weapons system. Let there be no doubt—those who labor to uphold the Constitution in the courts (domestically), and in the military (abroad), are worthy of our admiration, but the task of upholding the Constitution is far too large and demanding an endeavor to be assigned only to judges and those in the military. It was not only judges and members of the military that President John Adams was addressing when he declared:

Posterity! You will never know, how much it cost the present Generation, to preserve your Freedom! I hope you will make a good Use of it. If you do not, I shall repent in Heaven, that I ever took half the Pains to preserve it.

Our Constitution and its carefully designed checks and balances are essential to liberty, but just as indispensable are the efforts of Americans like yourself—members of the present generation—who know the Constitution and stand ready to defend it and the moral reasoning that undergirds it. The careful arrangement of checks, balances and limits in the Constitution cannot guard against encroachment of those limits any more than an oath to preserve, protect and defend the Constitution can compel the person taking that oath to honor it. We occasionally remember Lord Acton’s charge that “all power tends to corrupt; absolute power corrupts absolutely”, but we all too often forget his equally timeless charge that “Liberty...is the delicate fruit of a mature civilization...” When and where it does exist, it does so only at great effort and against all odds. The odds against liberty are very great today, but—in truth—they always have been. The creation of the Constitution did not change that. Likewise, the failure of the

Constitution to restrain encroachments through written parchment barriers did not change them either. Benjamin Franklin did not look to the Constitution to “keep” the Republic. He looked to the present generation, just as John Adams looked ahead to posterity. Instead of thinking of the Constitution passively, as a shield against abuses of power in government, we must learn to think of it actively, as a battlefield—and us upon it.

David Eastman is a graduate of West Point and a former Captain in the United States Army. He has served at all levels of US government; city, county, borough, state and federal, and in each case was obliged to take an oath to support and defend the U.S. Constitution; He studied jurisprudence under Sir David Yardley at the University of Oxford and is a former Lincoln Fellow with the Claremont Institute for the Study of Statesmanship and Political Philosophy, and a John Jay Fellow with the John Jay Institute for Faith, Society and Law. He is a co-founder of Tax Our Kids, which advocates for sustainable government spending on behalf of Alaska’s future generations. He lives with his family in Wasilla, Alaska.

[i] “The teaching that cannot finally be evaded then is that, even with the guidance of the Constitution, even with some of the principles contained there, imparting a useful discipline, casting up warnings, the decisive grounds of judgment must be found elsewhere, outside the text. They will have to be found, even yet, in those substantive moral principles that are not contained in the Constitution—and could never be entirely contained there. The Constitution remains as a vital framework, but it is evident that even many lawyers and jurists have forgotten the moral reasoning behind its articles and clauses. And for those of us who collaborate in the Claremont Review that project forms, for us, steady work.”

Hadley Arkes, “[The Mirage of Enumerated Powers](#)”, Claremont Review of Books (June 6, 2011).

The Heat Is On: Global Warming And The EPA (Part 1) – Guest Essayist: Phil Kerpen

For decades, environmental extremists have been stymied when their doomsaying predictions collide with the reality of an ever-improving environment, driven by the enormous wealth created by our market economy. The “problem” they describe is always something different, but the “solution” is always the same: draconian restrictions on economic activity, vastly expanded government power (usually internationally), and greatly diminished individual freedom.

In the 1960s, the doomsayers wrung their hands about over- population and predicted widespread famines before better technology drove an enormous increase in crop yields. In the 1970s, resource shortages were predicted that would cripple the global economy, with everyone from the Club of Rome to President Jimmy Carter convinced that we were up against meaningful resource constraints to growth. Yet prices plummeted for every significant natural resource as technology drove production and substitution. In the 1980s, the scare story was biodiversity, focused on the idea that the loss of so-called keystone species would cause a cascading effect that would kill us all. That turned out not to be true. So in the 1990s, the environmental extremists settled on a new doomsday scenario: global warming.

Global warming is different because its doomsday predictions can't be tested by reality. They depend on computer models that predict disaster many decades, or even centuries, into the future. The environmental extremists no longer need a new scare story every decade.

Carbon dioxide – a colorless, odorless gas with no direct adverse health effects – is at the heart of the global warming debate because it is the greenhouse gas that is most directly connected to human activity. The Obama administration is intent on having its way with carbon dioxide emissions at any cost, and by any means. In fact, President Obama's relentless pursuit of extreme global warming regulations is perhaps the clearest example of his disregard for our constitutional system of separation of powers and democratic accountability. There was fierce public debate over Obama's 2009 plan for draconian emissions cuts. The public opposed it, Congress rejected it, and the electorate, via the polls, clearly said "no." Yet Obama pushes forward.

These regulations will cost every American household thousands of dollars a year without any environmental benefit to show for it – except a nice, green feeling for our political elites. And to what end? The regulations would have *no* discernible impact on global levels of greenhouse gases or on global average temperature, even if you believe the most dire predictions about global warming. In fact, the 83 percent reduction in emissions Obama supports would prevent a ridiculously insignificant 0.09 degrees Fahrenheit of warming.³

These regulations are not being worked up on the House or Senate floor. They're being discussed behind closed doors. A secret effort has quietly moved forward to implement cap-and-trade – and even more extreme forms of regulation – by backdoor administrative means at the Environmental Protection Agency (EPA), an abbreviation that might better be reinterpreted as "Extreme Power Abuse."

CAP-AND-TRADE: A TAXING SITUATION

One of Obama's top priorities after taking office was to impose a national cap-and-trade scheme to ration energy use. Obama explained how the system would work in a meeting with the *San Francisco Chronicle* editorial board during the 2008 campaign:

Under my plan of a cap-and-trade system, electricity rates would necessarily skyrocket. Even regardless of what I say about whether coal is good or bad . Because I'm capping greenhouse gases, coal power plants, you know, natural gas, you name it – whatever the plants were, whatever the industry was, they would have to retrofit their operations. That will cost money: They will pass that money on to consumers.⁴

In other words, cap-and-trade is a way to impose a massive energy tax – and pretend it's not a tax. Once elected, Obama stopped honestly describing cap-and-trade; instead he launched a deceptive campaign to convince the American public that cap-and-trade would magically cause Americans to use much less energy without noticeably raising prices. Whether this campaign was borne from a deep sense of denial or outright malfeasance remains to be seen.

Al Gore himself explained the origins of cap-and-trade in describing the lesson he learned from

an attempt to pass a straightforward energy tax in 1993:

*I worked as vice president to enact a carbon tax. Clinton indulged me against the advice of his economic team . . . One House of Congress passed it, the other defeated it by one vote then watered it down and what remained was a pitiful 5 cent per gallon gasoline tax. That contributed to our losing Congress two years later to Newt Gingrich.*⁵

Enter cap-and-trade . The political “innovation” of the cap-and-trade scheme is that instead of levying a tax directly, it puts a cap on overall greenhouse gas emissions, and establishes a market for companies to buy and sell emission permits. The overall effect is the same – if a company wants to emit more carbon dioxide, it must pay more . So it’s a tax with the added uncertainty of a rate that’s unknown and set at auction. Despite these efforts at obfuscation, the so-called American Clean Energy and Security Act of 2009, known as Waxman-Markey, collapsed after its chief sponsors, U.S. Reps. Henry Waxman (D-Calif.) and Edward Markey (D-Mass.), could not hide its true tab. The Congressional Budget Office scored that cap-and-trade bill—a whopping 1,200-page tome, plus a 300-page amendment that was added at three in the morning on the day of the House vote—as an \$873 billion tax hike .⁶

The budget office also agreed, in its official analysis, with what Obama told the *San Francisco Chronicle* – that the costs would be passed on to consumers in the form of higher prices. CBO Director Doug Elmendorf explained in his Senate testimony, “Under a cap- and-trade program, consumers would ultimately bear most of the costs of emission reductions.”⁷

I don’t often agree with MoveOn.org, but on April 17, 2009, the organization sent out an urgent fund-raising alert to try to save cap-and-trade that got it exactly right. MoveOn.org’s Adam Ruben said in the e-mail: “If Republicans convince voters that clean energy legislation amounts to a new tax, Obama’s plan is toast.”

Of course, it *was* a tax. And it was toast. Enough Americans broke the code, with the help of those of us who weren’t going to let the Obama administration impose a nearly \$1 trillion stealth tax on an already overburdened economy. Obama’s failure wasn’t a failure of communication, it was a failure of obfuscation. Cap-and-trade is a huge tax hike, and the American people don’t want it.

While Waxman-Markey squeaked through the House in June 2009, it stalled in the Senate. Energy-state Democrats balked at the wildly unpopular bill, which was a bridge too far with the American people, already erupting in anger over health care take-over legislation.

Not even Senate Majority Leader Harry Reid (D-Nev.) and Obama could twist enough arms to force every Senate Democrat to walk the political plank on cap-and-trade, and only one Republican, U.S. Sen. Lindsey Graham (R-S.C.), continued to publicly support the bill. Eventually he pulled the plug, too, and the American people went to the ballot box in 2010 to, among other things, decide the future of cap-and-trade .

THE PEOPLE SPEAK: CAP-AND-TRADE IS TOXIC

Cap-and-trade was utterly buried in the 2010 election, most visibly in southwest Virginia, where coal-country Congressman Rick Boucher (D-Va .) – who had not only voted for cap-and-trade but cut the key deal to try to buy off opposition from some energy companies – was soundly defeated on the issue. Just a few days before the election, Boucher gave an explanation to the *Roanoke Times*: “It puts the burden on me to provide a complicated explanation to a complex issue and go through about a four-step logical process to persuade people that what I did was the right thing for coal.”⁸

It wasn’t, of course. And it was the wrong thing for the country. The people of his district had too much sense to listen to his excuses. Boucher, after 28 years, is no longer a congressman.

In nearby West Virginia, Democrat Joe Manchin was trailing in the polls until a game-changing television ad, “Dead Aim,” showed him shooting a bullet through the House-passed cap-and-trade bill with a rifle. According to *The Washington Post*’s Chris Cilizza, “It was a high-risk, high-reward move that clearly helped turn the race back in Manchin’s favor.”⁹ Manchin is now a U.S. senator.

It was the same story all over the country. Cap-and-trade supporters in competitive races lost. Notable losers who provided Nancy Pelosi with the key votes to get cap-and-trade past the finish line in the House included: Betsy Markey CD-Colo .), Alan Grayson (D-Fla.), Suzanne Kosmas (D-Fla.), Debbie Halvorson (D-Ill.), Baron Hill (D-Ind .), Frank Kratovil CD-Md.), Ike Skelton CD-Mo.), Harry Teague CD-N.M .), Steve Driehaus CD-Ohio), Mary Jo Kilroy CD-Ohio), John Boccieri CD-Ohio), Zach Space CD-Ohio), Paul Kanjorski CD-Pa.), Tom Perriello CD-Va.), Rick Boucher CD-Va.), and Steve Kagen CD-Wis.) .

That’s a pretty thorough rejection of cap-and-trade. One would think that the administration would get the hint and focus its attention elsewhere. But, incredibly, Obama and his EPA are attempting to revive this nefarious scheme, this time trying to hide it even further from taxpayers’ eyes and the democratic process by using an administrative agency to impose the regime, instead of following the legislative process described by the Constitution.

Phil Kerpen is head of American Commitment and a leading free-market policy analyst and advocate in Washington. Kerpen was the principal policy and legislative strategist at Americans for Prosperity for over five years. He previously worked at the Free Enterprise Fund, the Club for Growth, and the Cato Institute. Kerpen is also a nationally syndicated columnist, chairman of the Internet Freedom Coalition, and author of the 2011 book “Democracy Denied.

Excerpt provided by BenBella Books.

Untried Weapons – Repairing The Tattered Remains Of A Constitution That Has Not Been Tried And Found Wanting, But That Has Been Found Difficult; And Left Untried (Part 3) – Guest Essayist: David Eastman

This essay continues a series exploring briefly why the Constitution is ineffective at restraining federal officials today, and illustrates how members of the present generation must come to view their relationship to the Constitution if it is to be of service in effectively responding to federal overreach. The series will conclude by highlighting two largely untried and fundamentally different approaches to restoring constitutional constraints; issue-based legislative accountability, and a convention of states to amend the US Constitution.

Continuous Physical Reconnaissance

One of the lessons drilled into cadets at West Point, until it begins to find its way into their dreams at night, is the absolutely vital requirement to observe friendly obstacles on the battlefield. Army doctrine on this is as straightforward as it is inflexible: “Continuous physical reconnaissance of protective obstacles is extremely critical. Units must keep protective obstacles under continuous observation at all times” (Army Field Manual 90-7).

To a civilian, unfamiliar with what takes place on a battlefield, this may not be intuitive. After all, if I place a minefield and barbed wire on a stretch of road, isn’t my purpose to close off the road so that I don’t have to worry about it anymore? To a military officer, the answer is “No.” Any unguarded obstacle on the battlefield can—and will—be defeated by a determined enemy. The most formidable cliff can be scaled, the widest chasm bridged, and the thickest slab of concrete turned to rubble, if an obstacle remains unguarded for a sufficient amount of time.

Knowing this, the purpose of placing concrete barriers, barbed wire, and minefields is never to permanently close off an avenue of approach to an enemy. Rather, its purpose is to slow the enemy down long enough for forces to be mobilized against him, or to fix the enemy in a place where he can be attacked and destroyed. A minefield, with no one assigned to keep watch over it, accomplishes neither of these two things. If the enemy wants to badly enough, the minefield will eventually be cleared in one way or another.[i] And if no one is observing the minefield while it is being cleared, the opportunity to take advantage of the enemy’s slow progress, to either destroy him or to force his retreat, will have been entirely lost. To serve its purpose, each obstacle on the battlefield must be watched continuously, and an alarm sounded the moment an enemy approaches it.

As former military commanders, this was a principle that Presidents George Washington and Andrew Jackson knew well and highlighted in their respective farewell addresses to the nation:

But you must remember, my fellow-citizens, that eternal vigilance by the people is the price of liberty, and that you must pay the price if you wish to secure the blessing. It behooves you, therefore, to be watchful in your States as well as in the Federal Government...and unless you become more watchful in your States...you will in the end find that the most important powers of Government have been given or bartered away... (Andrew Jackson’s Farewell Address – March 4, 1837)

Towards the preservation of your government, and the permanency of your present happy state, it is requisite, not only that you steadily discountenance irregular oppositions to its acknowledged authority, but also that you resist with care the spirit of innovation upon its principles, however specious the pretexts. One method of assault may be to effect, in the forms of the Constitution, alterations which will impair the energy of the system, and thus to undermine what cannot be directly overthrown...The necessity of reciprocal checks in the exercise of political power, by dividing and distributing it into different depositaries, and constituting each the guardian of the public weal against invasions by the others, has been evinced by experiments ancient and modern; some of them in our country and under our own eyes. To preserve them must be as necessary as to institute them...let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. [emphasis added] (Washington's Farewell Address – September 17, 1796)

While President James Madison did not possess the battlefield experience of Washington and Jackson, he shared with them an intimate understanding of the role that citizens would have to play in protecting and maintaining the barriers that the Constitution put in place. Even before the Constitution was written, he explained:

...[I]t is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of Citizens, and one of the noblest characteristics of the late Revolution. The free men of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much soon to forget it. (James Madison, Memorial and Remonstrance against Religious Assessments; June 20, 1785)

While no man was more personally invested in bringing about the various checks and balances within the Constitution, Madison did not for a single moment place his faith in the various checks and balances to be able to preserve liberty by themselves. He argued that, for free government to be preserved, the various limitations on power would need to be scrupulously maintained. Further, it is the first duty of American citizens to be alert to any “experiments” that might impinge on the rights of the people and on any attempts to overreach “the great Barrier” that defended those liberties.^[ii] Without citizens to actively patrol the ramparts, what good is a moat, a drawbridge, or even the fortress itself?

More recently, Albert Einstein observed: “The strength of the Constitution lies entirely in the determination of each citizen to defend it. Only if every single citizen feels duty bound to do his share in this defense are the constitutional rights secure.”^[iii] The inescapable message from these four Americans; Washington, Jackson, Madison and Einstein—each of whom swore an oath to defend the United States Constitution—is that the rights protected by the Constitution are *not secure*. They remain insecure because no mere document, however carefully constructed, is capable of securing them. No Maginot Line of checks, balances and limits, however formidable, can bring to a final end the unrelenting tendency toward the consolidation of power in government.

Eventually, each obstacle that the Constitution sets up will be overrun, or simply bypassed, unless it is vigilantly observed and guarded by those who feel duty bound to defend our constitutional rights against usurpation. It is not enough to vote on Election Day. It never has been. Those who encourage Americans to register to vote, as though voting comprised the exclusive *sine qua non* of their civic duty, do all of us a disservice. If we are to take anything from the Founders, it must be that maintaining a free government requires much more than occasional action. The Constitution must be made known and it must be defended.

David Eastman is a graduate of West Point and a former Captain in the United States Army. He has served at all levels of US government; city, county, borough, state and federal, and in each case was obliged to take an oath to support and defend the U.S. Constitution; He is a co-founder of Tax Our Kids, which advocates for sustainable government spending on behalf of future generations of Alaskans. He lives with his family in Wasilla, Alaska.

[i] During the [Iran-Iraq War](#), children were wrapped in blankets and sent ahead of soldiers to clear minefields by walking through them on foot.

[ii] James Madison, “[Memorial and Remonstrance against Religious Assessments](#)”, June 20, 1785.

“The preservation of a free Government requires not merely, that the metes and bounds which separate each department of power be invariably maintained; but more especially that neither of them be suffered to overleap the great Barrier which defends the rights of the people. The Rulers who are guilty of such an encroachment, exceed the commission from which they derive their authority, and are Tyrants. The People who submit to it are governed by laws made neither by themselves nor by an authority derived from them, and are slaves.”

[iii] Albert Einstein, in a letter to the National Emergency Civil Liberties Committee; March 3, 1954.

Small Businesses Threatened With \$36,500 IRS Fines For Helping Employees With Health Costs – Guest Essayist: Grace-Marie Turner

Small businesses that reimburse employees for the cost of premiums for individual health insurance policies or pay their health costs directly will be fined up to \$36,500 a year per employee under a new Internal Revenue Service regulation that takes effect July 1, 2015 (article originally published June 30, 2015).

According to the notice, an employer arrangement that reimburses or pays for employee individual health premiums is considered to be a group health plan that is subject to the \$100 per-employee per-day penalty. The penalty applies whether the reimbursement is considered a before-tax or after-tax contribution.

“It’s the biggest penalty no one is talking about,” said Kevin Kuhlman, policy director for the

National Association of Independent Business. “The penalty for compensating employees for healthcare-related expenses is enough to destroy most small businesses.” You can read more in this NFIB post, “No Kidding: This Week IRS starts Punishing Businesses for Helping Workers Buy Insurance.”

The new IRS penalty is more than 18 times greater than the \$2,000 employer-mandate penalty under ObamaCare for not providing qualifying health insurance for employees. And employers with fewer than 50 workers are not exempt, as they are from the employer-mandate penalty.

The rule appears nowhere in the Affordable Care Act but was developed by the Obama administration’s regulation writers at the IRS. The rule punishes small businesses for providing the only health insurance support many can afford – a contribution to help employees pay premiums for their individual or family health insurance policies or to help finance direct payment for medical services.

“Reimbursing employees for the cost of insurance or medical services is a way for small businesses to help their workers without the administrative headaches of setting up a costly group plan,” Kuhlman said. “Most small employers don’t have HR departments or benefits specialists, so this is a simpler, easier way to help their employees.”

No more, says the IRS. If you take the “simpler, easier” route that you can afford, the IRS will slap you with \$100-a-day, per-employee fines until you stop.

Rep. Charles Boustany has introduced legislation in the House (H.R. 2911) and Sen. Charles Grassley, in the Senate (S.1697) to remedy the problem. Both bills await congressional action.

“If there’s an opportunity for a bipartisan improvement toward affordable healthcare, this has to be it,” said Kuhlman. “There’s no real justification for penalizing small businesses that do what the law’s strongest supporters claim to want, which is to help employees obtain coverage or pay medical bills. This is a rigid and thoughtless bureaucratic rule that undermines the purpose of the law, and it ought to be repealed immediately.”

The rule covers employers with more than one employee participating in an employer health care/coverage payment arrangement. Employers can exclude workers who 1) have fewer than three years of service to the company; 2) are under age 25; and 3) are part-time or seasonal employees. The \$100 a day fine applies for all other employees covered by the payment arrangement. S Corporations are exempt through the end of 2015.

This Market Watch article by Bill Bischoff provides many more details about this outrageous IRS rule that shows the intrusiveness and heavy-handedness of bureaucrats implementing Obamacare.

The above was originally published at [Forbes.com](http://www.forbes.com) on June 30, 2015.

<http://www.galen.org/topics/small-businesses-threatened-with-36500-irs-fines-for-helping-employees-with-health-costs/>

Grace-Marie Turner is president of the Galen Institute (galen.org), a non-profit research organization focusing on market-based health policy solutions.

The Heat Is On: Global Warming And The EPA (Part 2) – Guest Essayist: Phil Kerpen

REWRITING THE CLEAN AIR ACT OF 1970: A BACK DOOR TO SOARING ENERGY PRICES

Just to show you how unfazed the Obama administration was by the political defeat of cap-and-trade, consider what's on page 146 of Obama's 2012 budget: 'The administration continues to support greenhouse gas emissions reductions in the United States in the range of 17 percent below 2005 levels by 2020 and 83 percent by 2050.'¹⁰ Those just happen to be the same levels required by the failed Waxman- Markey cap-and-trade bill . Obama is telling the EPA to just pretend the bill passed and regulate away. In fact, Obama's EPA was already moving full-steam ahead to implement a global warming regulatory scheme that could be even *more* costly than cap-and-trade-without the approval of the American people and without so much as a vote in Congress. On December 7, 2009-right in the middle of the media firestorm over the Climategate scandal, which leaked e-mails from leading global warming alarmists that called some of the basic science into question-the EPA issued a so- called "endangerment finding" for greenhouse gases, paving the way for onerous greenhouse gas regulations to be shoehorned into the 1970 Clean Air Act, despite the fact that Congress had considered- and decisively rejected-adding such regulations in 1990, when the Clean Air Act was amended .¹¹ It is such an ill-fitting vehicle to address greenhouse gases that in order for this strategy to succeed, the EPA must, illegally, rewrite the law to suit its purposes.

The EPA wants to handpick which industries and carbon emitters it will regulate, because applying the law as written to greenhouse gases would by the EPA's own admission create "absurd results."¹² Not only is such a discriminatory approach patently illegal, but it will also fail to stop a regulatory cascade that will paralyze the American economy.

The Supreme Court opened the door for the misuse of the 1970 Clean Air Act with its decision in *Massachusetts v. EPA* in 2007 . That five-to-four decision instructed the EPA to decide whether or not to pursue global warming regulation based on the language of the statute.

Applying the Clean Air Act to carbon dioxide means regulating millions and millions of facilities across the United States never before subject to federal permitting, all the way down to some single- family homes. Even the EPA isn't that crazy, but instead of simply responding to the Supreme Court by concluding the Clean Air Act cannot be used for this purpose, the EPA has promoted itself to super-legislature of the United States, attempting to arbitrarily re- write the law to apply only to larger facilities and moving forward .

The organization is doing this despite the fact that one of the 1970 Clean Air Act's original authors, U.S. Rep. John Dingell (D-Mich .), who supports cap-and-trade, by the way, admitted that the Obama administration's move is a recipe for disaster. He said:

We are also looking at the possibility of a glorious mess being visited upon this country . . .

In last year's Supreme Court decision in Massachusetts v. EPA, the court stated that it believed that greenhouse gases are air pollutants under the Clean Air Act. This is not what was intended by the Congress and by those of who wrote that legislation . . .

So we are beginning to look at a wonderfully complex world which has the potential for shutting down or slowing down virtually all industry and all economic activity and growth . . .

Now, I am certain that the legal profession will enjoy this mightily and I am satisfied that this will be a full employment situation for lawyers, of whom I happen to be one, and maybe if I leave the Congress I will return to the practice of law so that I can enjoy this kind of luxurious emolument for creating complexity for our society and a significant downturn in economic activity 13

Through his mandate to the EPA, Obama himself has confirmed that, from his perspective, the resounding wishes of the American people on this issue are irrelevant. Furthermore, in the president's postelection press conference, he hid behind the Supreme Court decision, misinterpreting it as a "court order" (a legal term of art that as a former law school instructor Obama surely understands) for regulation. This is what he said about the EPA, underscoring that he still very much intends to make energy prices skyrocket, if not by cap-and-trade then by other means :

The EPA is under a court order that says green-house gases are a pollutant that fall under their [sic] jurisdiction ... Cap-and-trade was just one way of skinning the cat; it was not the only way. It was a means, not an end. And I'm going to be looking for other means to address this problem. 14

The following day, former White House green jobs czar Van Jones let the plan slip in even franker terms, saying:

*Those are your only three options. Regulate them hard. Tax them hard. Make them buy permits. Make 'em buy permits, that's called cap-and trade. Unfortunately, the minute we did that, the cap- and-trade proposal got called "cap and tax" and everything else and "socialism," and now we are without an option . . . So the only thing left for you, young folks, next year is to go back to the EPA and say, "Listen, we tried to pretend that what was going on was a market failure, i.e., we had the price wrong for carbon. The price being zero. And that didn't work, so now we're going to have to pretend it is a regulatory failure."*15

Jones often says openly what his friends and allies on the left believe but are usually more guarded about.

Phil Kerpen is head of American Commitment and a leading free-market policy analyst and advocate in Washington. Kerpen was the principal policy and legislative strategist at Americans for Prosperity for over five years. He previously worked at the Free Enterprise Fund, the Club

for Growth, and the Cato Institute. Kerpen is also a nationally syndicated columnist, chairman of the Internet Freedom Coalition, and author of the 2011 book “Democracy Denied.

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Untried Weapons – Repairing The Tattered Remains Of A Constitution That Has Not Been Tried And Found Wanting, But That Has Been Found Difficult; And Left Untried (Part 4) – Guest Essayist: David Eastman

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The Constitution and the Permissive Public

In the Federalist Papers, Alexander Hamilton made the rather unremarkable observation that “...nations pay little regard to rules and maxims calculated in their very nature to run counter to the necessities of society.”[1] For an example, he drew from antiquity the case of Sparta’s highly decorated admiral, Lysander, in the Peloponnesian War. Term limits in Sparta required that Lysander resign as admiral at the end of his one year term of office and that no person could hold the office of admiral a second time. Yet when Sparta suffered a naval defeat, Lysander was soon called upon to lead the Spartan Navy once more in battle. Hamilton noted “how unequal parchment provisions are to a struggle with public necessity.” To paraphrase; it isn’t a fair fight. When constitutional limitations are paired against public necessity in the boxing ring, it’s like trying to take on an opponent whose weight class is three classes higher than yours. Sure, you may get a few punches in. You may even secure a few concessions from your opponent in the process. But in the end, constitutional limitations will inevitably succumb to perceptions of public necessity.

In our own Constitution, in Article I, Section 8, Congress is granted power “to raise and support Armies” and “to provide and maintain a Navy”. No provision is given for Congress to provide and maintain an Air Force. And yet, if there was ever a cry against Congress providing us with an Air Force in 1947, it has been lost to history—drowned out by the perception that having an Air Force is a public necessity. Even that timeless opponent of federal overreach, Thomas Jefferson, found good reasons to overreach the barrier of the Constitution as president:

“A strict observance of the written laws is doubtless *one* of the high duties of a good citizen, but it is not *the highest*. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation...An officer is bound to obey orders; yet he would be a bad one who should do it in cases for which they were not intended, and which involved the most important consequences. The line of discrimination between cases may be difficult; but the good officer is bound to draw it at his own peril, and throw himself on the justice of his country and

the rectitude of his motives.” (President Thomas Jefferson in a letter to John B Colvin; September 20, 1810)

Presidents—indeed officials at all levels of government—have been throwing themselves on the justice of the country from the earliest days of the union. Had Jefferson been punctilious, he would not have made the Louisiana Purchase from Napoleon. Had Andrew Jackson been punctilious he would not have circumvented both Congress and the Louisiana Legislature in declaring martial law in New Orleans, later arguing “at such a moment, that constitutional forms should be suspended for the preservation of constitutional rights”. Indeed, we would have neither the Declaration of Independence nor the Constitution if delegates to the Continental Congress and the Constitutional Convention had not “acquiesce[d] in the necessity” of circumstances that involved the most important consequences to the nation.[2]

While apologists and media spokesmen will always be available to spin a story on behalf of those in power, and the cases above were no exception, I choose to highlight Jefferson and Jackson because both men readily admitted the questionable nature of their decisions in light of the Constitution. Was this a violation of their oath to defend it? In one sense, it was. But in another, it was in keeping with, and arguably inspired by, fidelity to that oath. In “Restoring the Constitution”, James Ceaser makes the case that those who would defend the Constitution today must first distinguish what a Constitution is and what it is meant to do from all the muddled thinking that surrounds the topic today. A constitution is law, but it is more than a legal instrument. It is also a political document. As John Marini argues in “Abandoning the Constitution”, it “is an attempt to spell out the conditions of just and reasonable government”, and an imperfect one at that. In keeping with Jefferson, no matter how unfavorable the circumstances happen to be, true fidelity to the Constitution could never embrace treating the Constitution as though it were a suicide pact.

In short, as the Framers understood it, true adherence to the Constitution can never become fanatical. While extremely important, and needing much more attention than it is given today, it can never be the one principle by which all other political activity is to be judged. As Bonhoeffer observed from a Nazi prison cell, “The fanatic thinks that his single-minded principles qualify him to do battle with the powers of evil; but like a bull he rushes at the red cloak instead of the person who is holding it; he exhausts himself and is beaten. He gets entangled in non-essentials and falls into the trap set by cleverer people.” In the end, the justice of the country saw fit to reward Jefferson with a second term and to elevate General Jackson to the presidency. It did not however accept the argument of necessity from all of our nation’s early presidents. Our second president, John Adams, argued that the Alien and Sedition Acts were likewise necessary to the security of the nation in avoiding war with France. Like Jefferson, he threw himself upon the justice of the country, and was booted from office, along with his party.

David Eastman is a graduate of West Point and a former Captain in the US Army. He has served at all levels of US government; city, county, borough, state and federal, and in each case was obliged to take an oath to support and defend the U.S. Constitution; He is a co-founder of Tax Our Kids, which advocates for sustainable government spending on behalf of future generations of Alaskans. He lives with his family in Wasilla, Alaska.

[1] Alexander Hamilton, “[Federalist 25: The Same Subject Continued \(The Powers Necessary to the Common Defense Further Considered\)](#)”, December 21, 1787.

[2] “We must, therefore, acquiesce in the necessity... We, therefore, the Representatives of the United States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions...” ([The Declaration of Independence](#))

Untried Weapons – Repairing The Tattered Remains Of A Constitution That Has Not Been Tried And Found Wanting, But That Has Been Found Difficult; And Left Untried (Part 5) – Guest Essayist: David Eastman

This essay continues a series exploring briefly why the Constitution is ineffective at restraining federal officials today, and illustrates how members of the present generation must come to view their relationship to the Constitution if it is to be of service in effectively responding to federal overreach. The series will conclude by highlighting two largely untried and fundamentally different approaches to restoring constitutional constraints; issue-based legislative accountability, and a convention of states to amend the US Constitution.

The Constitution in the 21st Century

The two hundred and forty years of our independence as a nation are replete with examples of times that our constitutional forms were temporarily set aside, and sometimes by our nation’s most revered statesmen. The claim of public necessity was used sparingly at first, but it is now made by presidents with an alarming frequency, and in recent years simply on the grounds that Congress has been slow to act. While the nation was once strict in drawing distinctions between matters of truly dire emergencies and matters of mere presidential impatience, it is claimed by some today that the American people have adopted a much more permissive posture and no longer have need of a Constitution whose primary role is simply to serve as an impediment to progress and “the political will of the people”. The nature of the Constitution as a political document is now readily admitted. What is now more likely to be questioned is whether it is—and should remain—a legal document as well. As Washington forewarned us, we have now reached that point where change by usurpation has become the custom of the land.[1]

The checks and balances of the Constitution, guarded by the popular will of the country, once offered a formidable obstacle to the ambitions of designing men. Today however, enemies of the Constitution have become more numerous, more diverse, and more brazen in demonstrating their antipathy towards it. The ambitious and the pragmatic deny the constitution temporarily, as an impediment to an aggrandized view of necessity. Added to this are today’s progressives and liberals (aptly characterized by Pelosi’s public contempt for the Constitution) who not only attack the Constitution, but also deny the very concept of a Constitution. Rounding out the number are the nihilists (self-described radicals such as Alinsky, President Obama, and Hillary Clinton) who attack not only the concept of a Constitution, but also the very society or culture that would give rise to one.[2]

One thing is certain; it will not be possible to find true solutions to our current constitutional

crisis without acknowledging the true depth of that crisis. The rise of progressivism provided America her first experience with a widespread movement whose “fundamental purpose [was] the destruction of the political and moral authority of the U.S. Constitution.”[3] That movement has been having its effect for some time, eroding faith in the Constitution and placing it instead in government as the sole source of rights and magnanimous protector of the oppressed. Those who favor this transfer of allegiance use the term “living Constitution” not to explain how we came to have such things as an Air Force, but to provide lip service for their contention that the Constitution is whatever the government says it is, or can get away with doing. With such lip service “Ignoring our Constitution became our constitution.”[4]

What is needed, as Professor Gary Lawson remarked some years ago, is the creation of “a constituency” of the Constitution.[5] The Constitution was and is a political document. Its checks and balances require defense not only in the courts, but also in the political decisions that we make as individuals. Despite the temptation, in this conflict we cannot fall back on the Constitution as simply a law needing to be enforced. Yes, it must be enforced if it is to mean anything at all, but the type of enforcement needed requires a sustained and lasting effort, both legally and politically, with victories counted in inches rather than miles. Any solutions that undermine that long-term effort must be cast aside. Any solutions that fail to develop a constituency of the Constitution must be cast aside. The excesses of federal overreach, now visible to all, have provided us the impetus to fight that overreach in earnest, with groups and organizations now highlighting those excesses in all parts of the nation: “The only question is whether the commanding officers are in sufficient possession of their wits to appreciate the real character of constitutional warfare. Only then can they develop a sound strategy based on reflection and choice.”[6]

David Eastman is a graduate of West Point and a former Captain in the US Army. He has served at all levels of US government; city, county, borough, state and federal, and in each case was obliged to take an oath to support and defend the U.S. Constitution; He is a co-founder of Tax Our Kids, which advocates for sustainable government spending on behalf of future generations of Alaskans. He lives with his family in Wasilla, Alaska.

[1] “If, in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit, which the use can at any time yield.” (George Washington’s Farewell Address)

[2] For those who find all of this just a bit confusing, the David Horowitz Freedom Center has provided an invaluable tool in “Discover The Networks: A Guide to the Political Left”, which is available free of charge at: <http://www.discoverthenetworks.com/>.

[3] John Marini, “Abandoning the Constitution”, Claremont Review of Books (Spring 2012).

[4] James Ceaser, “Restoring the Constitution”, Claremont Review of Books (Spring 2012).

[5] Gary S. Lawson, “[Limited Government, Unlimited Administration: Is it Possible to Restore Constitutionalism?](#)”, Heritage First Principles Series (January 27, 2009).

[6] Ceaser.

Death, Taxes & Bureaucratic Overreach: The EPA’s Relentless, Unconstitutional War On Coal – Guest Essayist: Congressman Morgan Griffith

Using a phrase attributed to Benjamin Franklin, “...In this world nothing can be said to be certain except death and taxes.” I would submit that in modern times, nothing is certain except death, taxes, and bureaucratic overreach.

This is especially so when it comes to this Administration’s Environmental Protection Agency (EPA).

There are countless examples of EPA’s bureaucratic overreach. Consider, for example, unreasonable guidance issued (and subsequently revised) by the EPA in 2013 which would have required that fire hydrants be subject to drinking water regulations that exempt shower valves and bathtub faucets. More recently, the Waters of the United States (WOTUS) rule proposed by the EPA and the U.S. Army Corps of Engineers would redefine protected waters, now subjecting to EPA regulation and control even a dry branch that only gets water during a gully washer, etc. This rule is set to take effect in August.

However, the EPA actions that I believe most acutely impact our way of life involve this EPA’s ongoing war on coal, which is contributing to plant shutdowns and mine closures in the coal-producing district I represent in Virginia and throughout the United States.

EPA last June proposed new regulations requiring our nation’s existing power plants to cut carbon dioxide emissions by 30 percent from 2005 levels by 2030. In issuing these “Clean Power Plan” regulations where Congress has refused to legislate, the President and his EPA are seeking to fulfill his promise made in a 2008 interview with the *San Francisco Chronicle* Editorial Board that, “...under my plan of a cap and trade system, electricity rates would necessarily skyrocket.”

I argue that with its so-called Clean Power Plan, this EPA is acting outside its authority in seeking to regulate existing power plants under Section 111(d) of the *Clean Air Act* because EPA already regulates existing power plants under Section 112 of that law. I believe EPA’s arguments in favor of their actions are weak, particularly given their concession on this point in *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008) as well as EPA’s own interpretation during the Clinton Administration that they could not regulate electric generating units under both Sections 112 and 111(d).

Laurence Tribe, who once was President Obama’s professor and is known as a liberal

environmental law expert, argues that the Clean Power Plan scheme is unconstitutional. Though they wish it weren't so, EPA's power is not unlimited. The Supreme Court reminded us of this when it on June 29 told the EPA they must consider costs of regulations of the *Clean Air Act* before deciding to adopt them. The Supreme Court's ruling requires the EPA to consider costs as the agency continues implementing the rules requiring power plants to cut emissions of mercury, etc.

The bad news, however, is that this ruling will not bring back the jobs lost as a result of previous plant shutdowns and mine closures, nor will it provide us with the electricity once produced by these facilities.

Where I come from, this means that – despite the Supreme Court invalidating this regulation – the Glen Lyn electric plant in Giles County, Virginia will remain closed. One of three electric generation units at the Clinch River facility in Russell County will stay closed forever. Further, one coal producer's affiliates have idled more than 70 mines, reduced their workforce by more than 3,200 people, and have taken tens of millions of tons of coal offline. It is unlikely most of these jobs will return.

This is, I believe, calculated strategy by the EPA: **create regulations and pretend you have authority**, knowing that, by the time the Supreme Court finds you don't have authority, the damage to American manufacturers and American families' pocketbooks will have already been done. The EPA gets their way, even if unlawful.

Our fight against EPA overreach continues. The House of Representatives recently passed the *Ratepayer Protection Act* (H.R. 2042), legislation I worked on that would allow for complete judicial review of any final rule in the Clean Power Plan before states are required to comply. Additionally, states would not be forced to implement a state or federal plan if its governor has determined it would significantly harm energy reliability or affordability. I strongly encourage those serving in our nation's Senate to consider this practical bill, and join us in protecting states and ratepayers from EPA overreach.

Congressman Morgan Griffith was first elected to represent the 9th Congressional District of Virginia in the U.S. House of Representatives on November 2, 2010, and is currently serving his third term. He is a member of the House Energy and Commerce Committee, serving on its Subcommittee on Energy and Power, Subcommittee on Health, and Subcommittee on Oversight and Investigations.

The Heat Is On: Global Warming And The EPA (Part 3) – Guest Essayist: Phil Kerpen

THE TRAIN WRECK: THE EPA'S MANY WAYS TO 'SKIN THE CAT'

Two weeks after the 2010 election and Obama's "skin the cat" comment, a leading D.C.-based, left-wing advocacy group, the Center for American Progress, published a 53-page report called *The Power of the President: Recommendations to Advance Progressive Change*, detailing a

sweeping far-left agenda that flies directly in the face of what voters made clear they wanted. 16 The report was coauthored by the president of the Center for American Progress, John Podesta, who was the chairman of Obama's transition team, and who has direct influence over the president and his key advisers.

The Podesta report does not comment on the EPA's efforts to regulate greenhouse gases directly under the Clean Air Act. It urges other less direct, but no less devastating, regulatory moves to accomplish the same goal.

Many of the EPA actions urged by the Podesta report are already under way at the EPA and are referred to in the energy industry as the "train wreck" because they seek to massively burden the coal industry with enough regulations to bankrupt it.¹⁷

Obama, during the same 2008 interview when he said his plan would make electricity prices "necessarily skyrocket," also explained the impact of his cap-and-trade plan on coal: "So, if somebody wants to build a coal plant, they can-it's just that it will bankrupt them."¹⁸ Not enough? The following rules are other ways to "skin the cat" and bankrupt the coal industry

- A rule that would classify coal ash as hazardous waste, which the Center for American Progress notes would "spur the retirement of coal-fired power plants."¹⁹
- An enormously expensive so-called Maximum Achievable Control Technology rule for industrial boilers, with exceptions for politically favored biomass. While the rule is ostensibly targeted at mercury, dioxins, and particulate matter, the Center for American Progress includes it in the section on greenhouse gases because the real goal is, of course, to cripple coal. Jon Basil Utley recently summarized the impact of this rule in *Reason*:

*The EPA wants new, more stringent limits on soot emissions from industrial and factory boilers. This would cost \$9.5 billion according to the EPA, or over \$20 billion according to the American Chemistry Council. A study released by the Council of Industrial Boiler Owners says the new rules would put 300,000 to 800,000 jobs at risk as industries opted to close plants rather than pay the expensive new costs. The ruling includes boilers used in manufacturing, processing, mining, and refining, as well as shopping malls, laundromats, apartments, restaurants, and hotels.*²⁰

- A Power Plant Air Toxics rule, which the Center for American Progress urged the EPA to adopt by November. This rule would require very expensive new technology at coal plants. As they explain: "Despite the rule being directed at toxics-and not greenhouse gas emissions-the new pollution control requirements could lead to many old inefficient plants being shut down rather than attempt to achieve compliance."²¹ On March 16, 2011, the EPA announced precisely this rule, with a targeted date of November 2011.²²
- The EPA's proposed tightening of ground-level ozone (smog) rules-a problem that most Americans thought was already solved. A study by the Manufacturers Alliance found that the EPA's new proposed ozone rules would knock a jaw-dropping 5.4 percent off of GDP by

2020, destroying 7.3 million jobs. ²³ Because these regulations fall heavily on refiners , they will bring a big jump in prices for gasoline and home heating fuel-along with a major hit to manufacturing and to coal.

Taken together, these regulations represent an all-out war on the coal industry and affordable electricity even above and beyond what the EPA is doing on the direct greenhouse gas regulation front.

Phil Kerpen is head of American Commitment and a leading free-market policy analyst and advocate in Washington. Kerpen was the principal policy and legislative strategist at Americans for Prosperity for over five years. He previously worked at the Free Enterprise Fund, the Club for Growth, and the Cato Institute. Kerpen is also a nationally syndicated columnist, chairman of the Internet Freedom Coalition, and author of the 2011 book "Democracy Denied.

Excerpt provided by BenBella Books.

The Heat Is On: Global Warming And The EPA (Part 4) – Guest Essayist: Phil Kerpen

THE CZAR BEHIND THE CURTAIN

Driving the implementation of the EPA's massive power grabs and circumvention of the legislative branch was a key White House official who avoided Senate confirmation by being installed as White House Energy Czar: Carol Browner.

The potential Senate confirmation fight Obama sidestepped by creating a czar position for Browner would have likely centered on her membership on the board of the Socialist International Commission for a Sustainable World Society.²⁴ Browner was listed as one of 14 members of the commission on its website as recently as January 5, 2009-the day she was named Obama's White House energy czar.²⁵ This commission pursues an openly socialist agenda of centralized control under a regime of global governance that would enforce extreme environmental political correctness globally. The commission's views on global warming are, to say the least, extreme. Commission statements from the time Browner served include:

- "Global governance is no longer a concept but an urgent "²⁶
- "A global system for monitoring and forecasting climate change, an international rescue service, an international center to design new industrial constructions ecologically, should be set "²⁷
- "Measures against climate change in every country will inevitably have to include a change in life style and a substantial reduction of greenhouse gases. The use of flexible mechanisms should be limited."²⁸

Browner is a longtime Washington insider who previously served as Al Gore's legislative

director and as the administrator of the EPA for all eight years of Bill Clinton's presidency.²⁹ Browner was on the board of Podesta's Center for American Progress.³⁰ She also worked for Podesta on the Obama transition team, chairing the energy and environment policy working group.³¹ Her ideas-the ideas of the Socialist International Commission on a Sustainable World Society- are likely shared by President Obama, who appointed her.

In 1998, long before *Massachusetts v. EPA*, Browner, as Bill Clinton's EPA administrator, had her general counsel, Jonathan Z. Cannon, prepare a now-infamous memorandum arguing for the first time-that the EPA possessed the power to adopt sweeping economy-wide global warming regulations without an act of Congress.³² At the time it was dismissed as a wild-eyed overreach that Congress would never allow. Now it's happening. We have national greenhouse gas regulations under the Clean Air Act for cars and light trucks. And it was Browner, an unconfirmed White House czar, who made it happen.

Mary Nichols, the chair of the California Air Resources Board, told *The New York Times* that Browner was the lead White House negotiator in establishing new automobile emissions standards. California had been threatening to adopt its own, more expensive standards, and the EPA had previously denied the states requests. Now the White House was playing ball, secretly adopting expensive, California-style regulations nationally via the Congress-sidestepping legal theory Cannon had argued for a decade before.

But unlike previous vehicle mileage requirements (legally, but at a great cost to consumers) enacted by Congress under the Corporate Average Fuel Economy law, these standards were created administratively, relying on the EPAS asserted authority to regulate greenhouse gases under the 1970 Clean Air Act.

Nichols told *The New York Times* that Browner "quietly orchestrated" the secret negotiations between the White House, regulators, and auto industry officials. "We put nothing in writing, ever," Nichols said.³³

To make matters worse, the already costly new automobile regulations, negotiated in secret by Browner and Nichols, are now set to be ratcheted up to absurd levels. In October 2010 the EPA issued a "Notice of Intent" to adopt, new standards on automakers to ensure that, fleetwide, their cars get 62 miles per gallon by 2025, up dramatically from the current mandate of 35.5 mpg by 2016. No cars on the road are anywhere close to 62 mpg. As Pat Michaels of the Cato Institute, a leading libertarian think tank, has pointed out, even the highest mileage vehicle now on the market, the third generation Prius, gets no more than 50 mpg, and its vehicle weight is too high to ever get much more than that.³⁴

The only vehicles that could ever meet this hypothetical 62 mpg standard would be tiny, underpowered, electric vehicles that consumers don't want. And if some larger vehicles were still available for families and workers that need them, that would force small passenger cars to get even *higher* mileage to average out to 62 mpg. They might as well just shutter the auto industry.

Left unchecked, Browner's unconstitutional plan will move beyond automobiles to regulate

everything that moves-light-duty trucks, heavy-duty trucks, buses, motorcycles , planes, trains, ships, boats, tractors, mining equipment, RVs, lawn mowers, forklifts, and just about every other piece of equipment that has a motor, and lots of things that don't. Any building over 100,000 square feet could be pulled in, along with smaller carbon dioxide emitters, like restaurants, schools, and hospitals that have commercial kitchens with gas burners.³⁵ Because there is no control technology for greenhouse gases, the EPA would require complete redesigns and operational changes. This is all part of the EPA's staggering 18,000-page blue- print for regulating the U.S. economy.³⁶

MEET THE NEW ENERGY CZAR

After the 2010 election, Carol Browner pushed for a promotion to deputy White House chief of staff- and even, apparently, the chief of staff job itself.³⁷ Given her controversial past, the White House decided, sensibly, not to promote her and she resigned as czar. Curiously, the announcement was made not by Browner herself or by official White House staff, but by Podesta, who said: "There was a feeling it was time to move on ... It's a loss. I hate to see her go."³⁸ Podesta's lead global warming strategist at the Center for American Progress, Dan Weiss, said the White House was losing the "all-star quarterback of President Obama's green dream team."³⁹

The Obama administration moved quickly to allay their concerns, promoting Browner's top deputy, Heather Zichal, to the climate czar role. Zichal, a former John Kerry staffer, holds the same extreme views and is committed to continuing the same extreme agenda. She said: "We're maintaining staff, the same focus and mission that this office has had since the first day of the administration."⁴⁰ To paraphrase The Who, meet the new czar, same as the old czar.

Browner's handpicked administrator, Lisa Jackson, remains at the helm of the EPA. The Jackson/Zichal team is without question moving forward on Browner's Socialist International agenda-and Browner herself, like Podesta, will continue to exert enormous influence even after officially leaving the administration.

Browner, predictably following in the footsteps of former green jobs czar Van Jones, announced her return to Podesta's Center for American Progress on April 19, 2011.⁴¹

The first regulations for large industrial facilities came into effect at the beginning of 2011 for major modifications. They are set to expand to include new construction later in the year, and will be expanded over time until, eventually, they could paralyze the American economy. ⁴² One of the first effects, of course, will be the skyrocketing energy prices that President Obama desires.

One EPA official, Anna Marie Wood, has let slip that the EPA intends to adopt cap-and-trade itself as part of its Clean Air Act regulations.⁴³ My Americans for Prosperity colleague James Valvo analyzed precisely how the EPA intends to implement cap-and-trade, mainly by adopting emissions trading requirements as a control technology and forcing states to amend the Clean Air Act State Implementation Plans to include cap-and-trade. Valvo concluded:

The idea of turning to the agency state to accomplish the same goals that the people's

*congressional representatives refused to make law runs afoul of the nation's democratic principles. Unfortunately, it appears that cap-and-trade advocates are less concerned with preserving these institutional checks-and-balances than they are with pushing hard to get the scheme enacted.*⁴⁴

Hold on to your wallet.

Phil Kerpen is head of American Commitment and a leading free-market policy analyst and advocate in Washington. Kerpen was the principal policy and legislative strategist at Americans for Prosperity for over five years. He previously worked at the Free Enterprise Fund, the Club for Growth, and the Cato Institute. Kerpen is also a nationally syndicated columnist, chairman of the Internet Freedom Coalition, and author of the 2011 book "Democracy Denied.

Excerpt provided by BenBella Books.

The Heat Is On: Global Warming And The EPA (Part 5) – Guest Essayist: Phil Kerpen

VIEW FROM COPENHAGEN

The full scope of what Obama, Browner, and the EPA intend to do without any congressional authorization was on display at the United Nations climate conference I attended in Copenhagen in December 2009.

At a side event hosted by Greenpeace called "Yes, he can! How Obama can deliver stronger emissions reductions," the Center for Biological Diversity presented a paper titled: "Yes, He Can: President Obama's Power to Make an International Climate Commitment Without Waiting for Congress."⁴⁵ The center laid out a frightening blueprint for precisely how the president could negotiate and enforce an agreement with just a simple majority of Congress instead of the 67 Senate votes our founding fathers required for treaty ratification, or, if he so chooses, he can instead bypass Congress and the Constitution entirely and simply rely on EPA action under the Clean Air Act for enforcement. If the administration is allowed to get away with this reprehensible tactic, it would set an ominous precedent for international promises and bypassing Congress to enforce them in other policy areas.

The remarkable disrespect for our democratic system was driven by a sense that Obama really worked for a global society, rather than for the American people. This was made especially clear by Marcelo Furtado, the executive director of Greenpeace Brazil, who said:

*I know the U.S. public elected Obama, but as you know he was voted around the world as a leader. He was elected as a moral leader from the global society. It was not a U.S. election only. It was a global leadership election.*⁴⁶

He got an enthusiastic reaction from the room, and his sentiments were echoed by others. Clearly, Obama was the great hope for the Copenhagen crowd, though these fans were disappointed at his

inability to force an intransigent Senate to accept cap-and-trade. They held out hope, however, that Obama would disregard the American people and instead serve the global society that had, in their view, elected him. That meant moving forward with unilateral executive action on the EPA track.

During the question-and-answer session I asked Kassie Siegel, one of the authors of the “Yes, He Can!” report, about the apparent illegality of the EPAS sleight of hand in the so-called Tailoring Rule, which requires permitting only for sources emitting more than 25,000 tons (the EPA would later raise this threshold to 75,000 tons), even though the Clean Air Act—which was written for toxic air pollution, not carbon dioxide (which, as one of the normal components of air is much more abundant)—sets the threshold at 100 or 250 tons, depending on the type of facility. As I noted earlier, the EPA did this because applying the law as it is actually written would create “absurd results.” Instead of using that absurdity to conclude the Clean Air Act shouldn’t be used for greenhouse gases, the EPA is attempting to arbitrarily rewrite the law.

Siegel’s response? She made it clear that at least one environmental group with a history of aggressive litigation is unconcerned about (or perhaps supportive of) the bureaucratic nightmare of millions of homes and businesses ultimately being subject to EPA permitting requirements. She said:

The political argument that’s been made by the Chamber of Commerce and many polluters is that, “Hey, we couldn’t do this. It would be unworkable because so many things emit carbon dioxide that if you went all the way down to the 250-ton threshold you would have to issue thousands and thousands of permits a year. And it would be a big problem and it would be a big mess, so let’s not do it.”

I think that’s wrong ...

I don’t think it would actually be such a big problem. We need to reduce emissions. I think way too much is being made of having to issue these permits. I think it’s completely workable ... It is reasonable proposal to start with big sources first and get to the smaller ones later.⁴⁷

Siegel’s group, the Center for Biological Diversity, has a multimillion-dollar litigation war chest to find judges sympathetic to their views, which means—despite the EPA’s efforts to rewrite the law—judges may eventually apply the full force of the Clean Air Act to greenhouse gases. You might need a federal permit if you have too many fireplaces.

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Excerpt provided by BenBella Books.

It's Time To Let Native Americans Practice Their Faith – Guest Essayist: Kristina Arriaga

In “Federalist 51,” James Madison wrote, “In a free government the security for civil rights must be the same as that for religious rights.” He went on to explain that for religious rights to be secure, pluralism is needed. Religious rights, he explained, “consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects...” Put simply, greater religious diversity equals greater religious liberty.

In my twenty years at the Becket Fund for Religious Liberty, I have seen this principle reinforced time and time again. When we fought the federal government all the way to the Supreme Court to preserve the “ministerial exception,” or the right of religious institutions to choose who they employ, more than 20 amicus briefs representing scores of different faith groups and leaders stood shoulder-to-shoulder with us. When we defended the owners of Hobby Lobby and their right to run their business according to their beliefs, we set a modern record for the number of amicus briefs filed in a Supreme Court case. Every time that we have fought the meddling hand of the government in the religious affairs of its citizens, we have been joined by other faith groups who seek the same goal: to live and practice their faith publicly and freely.

And since our nation came into existence 239 years ago, our religious landscape has only grown more diverse. But one group has been there all along: Native Americans. Within the Native American tradition there is incredible diversity of practice and belief. But one common thread many Native American traditions share is the use of feathers in sacred rituals. The most important and symbolic feather in much of Native American culture is the eagle feather.

Native Americans revere the eagle in a special and profound way. As the bird that soars above all others, they view the eagle as a messenger to the Creator, one that represents virtues like courage, wisdom, majesty, truth, and freedom. It’s no coincidence that the United States chose the eagle as its own symbol – it’s a beautiful animal that invokes awe for its freedom and grandeur. In the Native American tradition, it is the eagle that carries the prayers of humans to the Creator, and so they honor the animal in a deep way, and its feathers are an essential component of Native American worship and religious display.

But today, the government makes it illegal for most Native Americans to possess even a single feather. Farmers, ranchers, and large power companies can get permits to kill eagles. And some Native Americans can possess feathers if their tribe goes through a multi-year bureaucratic process of getting “federally recognized.” But most Native Americans have been denied this special status and are forever barred from possessing even a single feather.

One of our clients, Mr. Robert Soto, is a member of the Lipan Apache tribe. His tribe has been denied federally recognized status despite being recognized by historians and the government of the state of Texas. Soto is a religious leader in his tribe and a renowned feather dancer. He cannot simply stop practicing his religion. So he used his sacred eagle feathers, until an undercover federal agent raided his powwow and confiscated the feathers.

It took nine years of litigation, but he eventually got them back after challenging the federal government under the Religious Freedom Restoration Act (RFRA), which prohibits the government from burdening the free exercise of religion without a compelling reason. Locking up an ancient culture's headdress, it turns out, is not compelling, as the Fifth Circuit ruled. But even after returning the feathers, the government claims that it is illegal for Mr. Soto to share those feathers with his family or members of his congregation. He is also subject to prosecution if he gets additional feathers.

As my colleague, Senior Counsel Luke Goodrich said, "It's time to let Native Americans practice their faith; we're not living in the 1800s anymore."

James Madison didn't mention eagle feathers in *The Federalist Papers*, or the Constitution for that matter. He didn't mention a lot of different religions and their sacred practices, because the idea was that the principle of religious liberty is expansive and intended for *all*.

Two hundred years later, it feels like we are still waiting for certain members of the federal government to get the memo.

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The Heat Is On: Global Warming And The EPA (Part 6) – Guest Essayist: Phil Kerpen

In America, as our founders intended, the states are where the rubber meets the road.

CONGRESS? WHAT'S THAT?

Unfortunately, the strategy of bypassing Congress is not simply a pipe dream of groups like Greenpeace and the Center for Biological Diversity. As the secret Browner/Nichols deal on automobile emissions made clear, this way of thinking is now driving administration policy. That was confirmed by a pamphlet from the EPA given out at the United States pavilion in Copenhagen titled: “Working Domestically to Drive Innovation and Greenhouse Gas Reductions.”

It outlined many of the EPA actions covered in this chapter, promising the “EPA will continue to work with international partners, states, and localities, as well as Congress, to put climate solutions into action” (emphasis added). It appears that Congress, and the American people who elect them, are an afterthought, and the bureaucrats are committed to moving forward with or without them.

That was confirmed by another briefing I attended in Copenhagen by Jackson, where she

promised the EPA was moving forward with or without Congress. When she was asked whether cap-and-trade legislation would be helpful to avoid lawsuits slowing down the EPA, she responded that lawsuits were inevitable. Then she volunteered something surprisingly frank:

*The main reason for legislation is that it's economy- wide and that it's a very clear signal and that it allows for the give-and-take that happens in the legislative process so that people buy in and really buy in.*⁴⁸

That's the real reason for the big push for cap-and-trade legislation-for broader political buy-in – not because she needs, in her view, *any* new statutory authority to pursue sweeping regulations of the whole U.S. economy.

FIGHTING BACK: THINK GLOBALLY, ACT LOCALLY

While the Obama administration is eagerly trying to use the EPA to disregard the wishes of American voters to please its friends in the “global society,” one solution to the globally driven EPA attack on American democracy is local: state governments can and must fight back. In order to implement its vision of regulating the U.S. economy by shoehorning greenhouse gases into the Clean Air Act, the EPA must coerce state legislatures to amend their state laws to conform to the new definitions the EPA has created. It takes executive power to new and unprecedented levels, because we now have unelected, unaccountable federal bureaucrats dictating to the elected legislatures of the states that they must change state laws to conform to the new bureaucratic paradigm . Moreover, if they can get away with it now, the next step will be to force states to adopt cap-and-trade programs.

But the good news is that the states are fighting back. At least 15 states have filed federal lawsuits challenging the EPA's greenhouse gas regulations.⁴⁹ The lawsuits challenge such issues as the basic science of global warming, whether warming would on balance endanger human health, the way the EPA handled proprietary data, and the EPA's failure to conduct the appropriate economic analysis required by law. Unfortunately, most of the states are also bringing their laws into compliance at great human and economic cost in case they lose in court. The exception is Texas, which is taking a defiant stand with the commonsense position that federal bureaucrats, acting contrary to Congress's wishes, do not have the right to demand changes to state laws. Texas Attorney General Greg Abbott and Texas Commission on Environmental Quality Chairman Bryan W Shaw sent a letter to the EPA explaining their decision not to comply. They said:

*In order to deter challenges to your plan for centralized control of industrial development through the issuance of permits for greenhouse gases, you have called upon each state to declare its allegiance to the Environmental Protection Agency's recently enacted greenhouse gas regulations-regulations that are plainly contrary to U.S. laws . . . To encourage acquiescence with your unsupported findings you threaten to usurp state enforcement authority and to federalize the permitting program of any state that fails to pledge their fealty to the Environmental Protection Agency. On behalf of the State of Texas, we write to inform you that Texas has neither the authority nor the intention of interpreting, ignoring or amending its laws in order to compel the permitting of greenhouse gas emissions.*⁵⁰

With this bold statement, Texas has made clear that it will not proceed with the new EPA greenhouse gas rules pending litigation over their legality. Other states would be wise to follow Texas's lead, because the administrative burden on state permitting agencies will be crippling. The backlogs created by the flood of new permit applications will not only shut down economic activity, most notably new construction, but will also cripple state environmental agencies, which will be unable to deal with the crush of new paperwork. Thus the EPA's global warming power grab may actually undermine environmental enforcement at the state and local levels. (That's okay, evidently, since it will increase the power of the Obama administration and people like Zichal and Jackson.)

In America, as our founders intended, the states are where the rubber meets the road, and at least one big state is simply refusing to go along with what the EPA is doing. It's a fight worth having, even if the courts ultimately do not agree, because in the meantime it will protect Texans and help educate the rest of the country about what the EPA is trying to do and the need for Congress to step in and stand up for itself and the American people.

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Excerpt provided by BenBella Books.

Untried Weapons — Repairing The Tattered Remains Of A Constitution That Has Not Been Tried And Found Wanting, But That Has Been Found Difficult; And Left Untried (Part 6) – Guest Essayist: David Eastman

Previous essays in this series explored why the Constitution is ineffective at restraining federal officials today, and illustrated how members of the present generation must come to view their relationship to the Constitution if it is to be of service in effectively limiting federal overreach. This series now concludes by highlighting two largely untried and fundamentally different approaches to restoring constitutional constraints today; issue-based legislative accountability, and the calling of a convention of states to amend the United States Constitution.

A Convention for Our Time

When we survey the Constitution today, it is increasingly difficult to picture it as the splendid banner raised by Washington and his fellow delegates at the Constitutional Convention of 1787. Nor does it today call to mind the iron chains described by Thomas Jefferson when he spoke of binding men down from mischief "by the chains of the Constitution." Instead, the Constitution hangs frayed and tattered today, a silent witness to more than two centuries of flying above our nation's capital. Its form has changed very little since 1787, but much of the life has gone out of it. Some today have begun to ask if it isn't time for another convention—and in no state is this

idea greeted with greater enthusiasm than here in Alaska. Holding a convention would open the door to a whole series of amendments, which could add new thread to a tattered banner, and in so doing breathe new life into the Constitution. Even so, when the idea of a second convention first began to gain traction in 1788, James Madison argued that the timing of any future conventions should be chosen only with great care. Whether the timing is right for another convention is an important question, and one to which any serious student of the Constitution should give careful consideration.

On November 4th of this past year, Republicans won majorities in more state legislative bodies than at any time in American history, including the Civil War. In total, voters handed Republicans control of 69 out of 98 chambers; more than 70% of all state legislative chambers nationwide. Republicans are now in complete control of the lawmaking process in 23 states, more than three times as many as Democrats control. This historic shift has created opportunities for Republicans that would have been unthinkable only a decade ago, and has spurred legislators in Alaska and other Republican states to think seriously about the prospect of making fundamental changes to the Constitution and the power of the federal government.

One proposal that has found support in Alaska is The Compact for America, a formal agreement between states to begin the process of adding a balanced budget amendment to the Constitution. This proposal takes advantage of a little known passage in the Constitution that allows state legislatures to initiate a constitutional amendment that would have the same effect as if the amendment had been passed by Congress. The passage is found in Article V of the Constitution.

Interestingly, in the initial draft of the Constitution this was the only method by which the Constitution could later be amended. During the Constitutional Convention, Alexander Hamilton argued that the power to initiate amendments to the Constitution should be given to Congress. In the end a compromise was achieved whereby an amendment could be initiated either by Congress acting on its own volition or by Congress acting on the request of two-thirds of the state legislatures, with subsequent approval required from three-fourths of the states in order for an amendment to become official.

On the last day of the convention before the Constitution was signed, George Mason cautioned that both options left the states at the mercy of Congress, which could frustrate any effort to pass an amendment that attempted to further limit its power. In response, delegates from Pennsylvania and Massachusetts proposed that any amendment initiated by the states would trigger Congress to call a convention for proposing amendments, and this method was inserted into the Constitution in place of two thirds of the legislatures themselves authoring an amendment. Once the vote was taken, James Madison couldn't help pointing out that, other than opening the door to all of the ambiguities involved in holding a convention, the change had had very little effect, as the process still relied upon Congress to invite the states to a convention. The argument that Congress would never act to limit its own power has been fairly proved by history. Not since the bill of rights was passed by Congress in 1789, has Congress added an amendment to the Constitution that served the purpose of limiting its own power. And of course it has never invited states to attend a convention. But perhaps, given the unique circumstances the nation finds itself in today, with Republicans in control of 70% of state legislative bodies, and both chambers of Congress, it will soon do so. Has the time now come to amend the Constitution?

Looking through the writings of the Founders one would be hard pressed to find a single person who considered the Constitution a perfect document. Even “The Father of the Constitution”, James Madison, wished that the convention had made additional changes before signing it, and fully expected that some of the changes he desired would be made over time through the amendment process. Accordingly, it would be a very grave mistake to consider someone who desires to amend the Constitution as an opponent or enemy of the Constitution itself. Remembering the words of Washington, the customary weapon used to destroy free governments is not the amendment process itself, but rather amendments accomplished through usurpation or designed in their nature to undermine the Constitution.

Let us assume for a moment that Congress will call a convention once the Compact for America, or the Convention of States, or those supporting the Countermand Amendment, or one of the various similar projects, have succeeded in prevailing upon the requisite number of state legislatures to request a convention. Once this hurdle is reached, what will happen? As James Madison remarked during the Constitutional Convention, since the convention method was inserted into the Constitution on the last formal day of debate and discussion prior to signing, the document itself is noticeably lacking in details on how a convention should be called and, once called, how it should operate.

Much has been made of this silence, and of the uncertainty that would accompany the calling of any of the aforementioned conventions. However, there are other aspects of amending the Constitution through the convention process that have received little to no attention, and which weigh heavily on the role a convention should play in efforts to rejuvenate and breathe life back into the Constitution. One thing is certain, the topic of a convention has captured the imagination and enthusiasm of many today, and without that enthusiasm it is difficult to see how any plan to restore the Constitution can succeed. A second thing is certain, namely, that very few of those who are laboring on behalf of a convention have had the opportunity to attend or participate in one. For the majority of Americans who have not had the privilege of attending a convention, let us briefly revisit the two most recent conventions, sponsored and financed in large part by the federal government, at which decisions of critical importance to our nation were decided.

A Brief Glimpse at National Conventions

Nothing beats being there in person, but live video is a close second. So let us travel briefly to a scene from the most recent Democratic National Convention, held on September 5th, 2012. Truly, words can’t capture the experience; this 4-minute clip from C-SPAN, particularly the second half, is a must-watch in order to picture in your mind something of what a convention would be like.

By way of background, the national convention of any organization is the one moment in an organization’s existence when those who hold the decision-making power within the organization are all gathered together in one place. In the case of the Republican and Democratic National Conventions, elections are first held in local neighborhoods. Those elected often then go on to county elections and then regional elections. In each case, the number of elected convention delegates grows smaller and smaller. The final step before a national convention will be the holding of state conventions in all fifty states and U.S. territories, where delegates are

elected to represent their state or territory at the national convention. When delegates from each of the fifty states meet at the national convention, the future of the organization is laid on the table. It is the one time that the organization can re-imagine itself. If the delegates at a national convention wanted to change the name of the Democratic Party to the Progressive Rainbow Party, and their mascot from a donkey to a giraffe, they could do so. They need permission from no one, as collectively they are the ultimate decision-maker within the organization. Once the convention has concluded, the organization returns to being governed by its policies and bylaws as before. But during the convention, the delegates assembled may amend those bylaws, or vote to replace them entirely, as they see fit. At least, that's what the Charter and Bylaws of the organization say should happen.

If you watched the clip above, you will notice that that's not what happened. On September 5th, the delegates at the Democratic National Convention voted to change the position of their party with respect to removing God from their platform and no longer recognizing Jerusalem as the capital of Israel. They voted four times; first in committee, and three times on the floor of the convention. The votes were expunged from the record, and the Democratic Platform stands today as though they had never taken place.

But wait, how can someone ignore the votes of the duly-elected delegates, who would do that? Welcome to the state of our union and the integrity of our current political convention process. When the delegates vote, it may be counted—or it may not be. Was this an informal gathering around a backyard barbeque? No, this was the official national convention at which the next president and vice president of our country were selected by the delegates in attendance. The two men who conspired to override the votes of more than 5,000 delegates were a former state governor and the mayor of the second largest city in the nation (who also happens to now be the national co-chairman for Hillary Clinton's Presidential Campaign). The federal government spent \$136 million supporting the official Republican and Democratic National Conventions in 2012 because they were believed to be that important to the future of the country. Lest I leave the impression that the Democratic National Convention is the only convention that operates in this manner, let us remember what took place at the most recent Republican National Convention that was held exactly one week before the Democratic National Convention.

Not only do the national conventions decide who will be on the ballot for president and vice-president, they also decide how presidential nominees and their running mates will be chosen in future elections. At the 2012 Republican National Convention, fundamental changes were made to the process of selecting future Republican presidential nominees. The changes were very controversial at the time, as they would almost certainly have prevented Ronald Reagan from ever being elected president as a Republican if they had existed when he first ran for president in 1976.

The changes themselves are having a profound effect on the 2016 presidential election, but of much greater importance to the present topic is the manner in which those changes were made. Delegates were told that they would not be able to enter the convention grounds except by bus for security reasons. When it came time to vote on the changes in committee, the leaders of the opposition were not permitted to attend the vote because their bus driver refused to take them to the convention. After their bus arrived an hour late to pick them up, the delegates from the State

of Virginia were driven around the city for 45 minutes, entering and then exiting the convention's security gates three times. In the end, the delegates demanded to be let off the bus and walked to the convention, but were unable to arrive in time for the vote. When it came time for more than 2,000 delegates to vote on the changes, their votes were ignored and those filming the convention noted that the official convention teleprompter had already determined in advance that their votes would be ignored.

A Return to Parchment Barriers

Earlier in this series we recalled James Madison's refusal (in Federalist #48) to place trust in written laws ("parchment barriers") alone to constrain the functioning of government. We also recalled Alexander Hamilton's observation in Federalist #25 that nations quite naturally ignore written laws when those laws run counter to the necessities of society. Laws and Constitutions alone, like minefields and barbed wire, are not enough to stop a determined enemy from advancing. However, they can play an important part in turning an enemy back if they are carefully guarded by citizens committed to their defense. But what of conventions? If even laws cannot keep back a determined foe, how much less should we trust to customs and political processes to do what even the law itself could not?

As a rule, the courts abstain from resolving political questions, so the delegates who were disenfranchised at the Republican and Democratic National Conventions quite literally had nowhere to turn and no one who could aid them in correcting the injustice that they witnessed. Political problems, in this sense, often require political solutions. The Alien and Sedition Acts were not repudiated by the courts, but rather by the people themselves in the next election. However, even if the courts were disposed to take an active role in resolving any controversies that might attend a future Article V convention, there is still a problem. We are told that one of the reasons to call a convention today is the fact that the courts have proven to be so ineffectual at maintaining constitutional limits. In such a setting as this, do we really believe that the courts will actively guard the integrity of the convention process? If the iron strength of the Constitution and the concrete nature of laws are insufficient to limit federal overreach today, on what basis do we look with hope to the plastic flexibility of a political process?

And yet, as we presumed with Congress, let us also presume that the courts will likewise play a constructive and helpful part in the convention process. What then? The Achilles heel of the convention of states project is that the process of pursuing constitutional amendments by way of a convention is, while constitutionally prescribed, primarily a political process. Legislators are to vote on whether or not to call a convention. Members of Congress are to determine that enough state legislatures have done so. Delegates are to be elected. They are to cast votes at a convention. From start to finish, the process will be a political one. And yet, as Professor Laurence Tribe has so eloquently pointed out:

"But it seems to me that the very thing that is said to make a convention essential is the supposed failure of our political process; its polarization; its paralysis; its capture by special interests. And to rely on that supposedly failed process in order to provide a backstop so that putting the whole Constitution on the table up for grabs is a good idea at this point in our history seems to me to be—to sort of live in two different worlds at once. One world that says ordinary politics

has totally broken down, and we can't trust it. And the other world that says we can trust ordinary politics in order to make it a safe bet to put the Constitution on the table up for grabs." (Excerpt at 1:04:37)

Proponents of holding a convention have sought to mitigate this concern by taking every possible step to make it a legal process, rather than a political one. And yet, if their claims are true, they have now created a legal process that will effectively silence that portion of the country that has been so successful in both the political and judicial arenas at converting or co-opting our nation's institutions in furtherance of the progressive agenda. In fact, they purport to have been so successful in this that it ignores progressive objections to their project entirely.

The Convention of States website lists more than a dozen articles written in response to opponents of a convention. However, the articles listed do not respond to Hawaii legislators calling for a convention to repeal the second amendment, or legislators in California, Illinois, New Jersey and Vermont who have already requested that Congress call a convention to overturn the Supreme Court case *Citizens United*. In fact, their arguments today are focused entirely against those with whom they claim to have general agreement on long-term goals, and are silent when it comes to those with whom they disagree. In overstating their case regarding the risks of a convention, they undermine perhaps the strongest argument for a convention; namely, that the process of carrying a convention through to a successful conclusion will require building and organizing sufficient political strength and will to be able to meet the opposition in political battle on their own terms.

The process of amending the Constitution was designed to be difficult, and the convention path does not avoid that. If anything, the convention path was expected to be even more difficult, because the political nature of the process would naturally give pause to any faction or group of states who could start the process, but lacked the political strength to follow it through to completion. Starting the convention process in many respects requires the least political muscle. Following that process through to the successful election of delegates in all parts of the country, maintaining accountability of those delegates at a convention, ratifying any proposals in three quarters of the states, and then being able to compel enforcement of any new constitutional provisions—now that requires political strength. If we lack that strength today, why should we suppose that we will be in possession of it when it comes time to elect delegates and the opposition invests hundreds of millions of dollars in frustrating any effort to rollback the power of the federal government? In such a case is it not at least plausible, perhaps even probable, that the opposition will win a majority of delegate elections, as they have managed to win a majority of Congress? Should that transpire, we would no longer be looking merely at the “nuclear option” of amending the Constitution. It is all too likely that in the political upheaval that would follow, the convention process would come to be referred to as the “singularity option”, never again to be tried.

But What of the Founders

Those advocating amending the Constitution today, especially by way of the convention process, put much weight on the notion that the Framers of the Constitution would give applause to their project if they were but here to observe it. Indeed much has been made of a statement made by

Madison that ‘if the absence of a provision in the Constitution permitting state nullification were to be found not to secure the government and the rights of the states, the final constitutional resort would be to amend the constitution.’ This, they argue, demonstrates Madison’s support for amending the Constitution to compel adherence to it. It is a presumption that bears neither the weight of Madison’s writings nor the writings of the Framers.

In 1788, less than a year after the first convention, Madison wrote that he ‘should tremble at the result’ if a second convention were to be held at that time. Writing in Federalist #49, he offered still further reasons to oppose conventions, not the least of which was the nature of those who would be selected to attend a future convention:

“The same influence which had gained them an election into the [Congress], would gain them a seat in the convention. If this should not be the case with all, it would probably be the case with many, and pretty certainly with those leading characters, on whom every thing depends in such bodies. The convention, in short, would be composed chiefly of men who had been, who actually were, or who expected to be, members of the department whose conduct was arraigned.”

Supreme Court Justice Antonin Scalia echoed his concerns recently in saying that he certainly “would not want a constitutional convention” and that “this is not a good century to write a constitution.” While neither man opposed the concept of a convention at some point in American history, each resolutely objected to holding one at the time that they were asked for their thoughts on having one. One thing that the Convention of States project does get right is its recognition of the underlying cause of our present constitutional crisis. When they discuss accountability they conclude by saying: “The problem is not the politicians, but the citizens of your state for not holding your state legislators accountable to you, the PEOPLE!”

On this they have strong support from the Framers. In Federalist #57, Madison explains that, of all the various means available to prevent government degeneracy, elections are the single most effective:

“The elective mode of obtaining rulers is the characteristic policy of republican government. The means relied on in this form of government for preventing their degeneracy are numerous and various. The most effectual one, is such a limitation of the term of appointments as will maintain a proper responsibility to the people.”

To reinforce this point, in Federalist 44, he prescribes the cure for our present predicament:

“If it be asked what is to be the consequence, in case the Congress shall misconstrue this part of the Constitution, and exercise powers not warranted by its true meaning, I answer, the same as if they should misconstrue or enlarge any other power vested in them; as if the general power had been reduced to particulars, and any one of these were to be violated; the same, in short, as if the State legislatures should violate the irrelative constitutional authorities. In the first instance, the success of the usurpation will depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts; and in the last resort a remedy must be obtained from the people who can, by the election of more faithful representatives, annul the acts of the usurpers.”

And in the final installment of this series we will consider a much less publicized, but much more practical approach to restoring deference to the Constitution at all levels of government.

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The Heat Is On: Global Warming And The EPA (Part 7) – Guest Essayist: Phil Kerpen

In our constitutional republic, the Congress of the United States is the legitimate legislative branch of government, charged with making the laws. A decision to adopt any national global warming program is an enormous one, with hundreds of billions of dollars and personal liberties at stake. This is simply not something that ought to be done through the back door via an unelected, unaccountable agency.

As with all executive power grabs, the EPA ultimately can only do what Congress allows. Voters must constantly remind their elected representatives that they expect them not only to oppose bad laws but to step in and stop the executive branch when it oversteps its bounds.

The U.S. Senate had its first opportunity to stop the EPA's global warming regulations on June 10, 2010. On that day, U.S. Sen. Lisa Murkowski CR-Alaska) forced a vote on overturning the EPA's finding that greenhouse gases endanger public health and welfare. Because all of its subsequent global warming regulations (though not the indirect threats, which must be stopped separately) legally depend on the endangerment finding, it would have effectively closed the door on the direct regulatory threat. Vehicle emissions standards would exist only under the Department of Transportation as authorized by the CAFE law.

It usually takes 60 votes to get things done in the U.S. Senate, but overturning regulations can be done with a simple majority of 51. That's because of a special procedure passed as part of the 1994 Contract with America called the Congressional Review Act. It created a special process where it takes only 30 senators signing a petition to force an up-or-down, filibuster-proof vote on overturning a federal regulation on the Senate floor. It can only be done within 60 legislative days of a regulation going final, though, so it's a one-shot deal.

The process has two principal weaknesses. First, unlike Kentucky Republican Congressman Geoff Davis's REINS Act, it fails to place an affirmative burden on Congress to approve new regulations. Instead, even enormously consequential regulations like the endangerment finding can move forward by default unless Congress decides to intercede. While REINS is proactive, the Congressional Review Act is reactive. Second, there is no expedited procedure on the House side, which means Congressional Review Act actions can typically only be voted on if House majority leadership wants them to be.

Nonetheless, the use of the Congressional Review Act put every senator on the record as to whether or not he or she wanted to stop the EPA. It was more than symbolic. If it had passed the Senate, the House would have been under tremendous pressure to consider it. If it passed the House, Obama would have had to either stand the EPA down or veto the resolution, taking full personal credit for what the agency is doing.

That's why the White House intervened in an enormous way to turn the tide when it looked like Murkowski's resolution would pass. The White House issued a veto threat and dispatched top officials, including Carol Browner, to the Hill to pressure Democratic senators.

When every other tactic had failed, and the resolution still appeared headed for passage, Harry Reid promised a group of terrified coal-state Senate Democrats a political cover vote on *delaying* the EPA regulations if they would agree to vote against *stopping* them. Even so, all 41 Republicans and six Democrats voted to stop the EPA. The 47 votes were just four shy of the 51 needed for passage. The six Democrats who did the right thing were Blanche Lincoln (D-Ark.), Mary Landrieu (D-La.), Ben Nelson (D-Neb.) (those three were cosponsors and most in need of some redemption after their health care votes), Evan Bayh (D-Ind.), Mark Pryor (D-Ark.), and Jay Rockefeller (D-WVa.).

When the Senate had its first chance to stop the EPA, it failed to do so, and all the Democrats who voted "no" bear responsibility. Senators like Bill Nelson (D-Fla.), Claire McCaskill (D-Mo.), Jon Tester (D-Mont.), Kent Conrad (D-N.D.), Sherrod Brown (D-Ohio), Robert Casey (D-Pa.), and Herb Kohl (D-Wis.) were convinced that even though the regulations at stake were disastrous for their states, they could survive politically because the issue of regulation is not well understood. They deserve to be shown otherwise.

Another senator whose term is up in 2012 gave one of the most bizarre floor speeches I've ever seen in the debate over Murkowski's resolution: Jim Webb (D-Va.). For months Webb had quietly worked to build support for the resolution among Democrats. He comes from the coal country of southwest Virginia, the same area that dumped Rick Boucher for advancing cap-and-trade. He has a strong populist streak that bristled at the idea of bureaucrats setting policy instead of Congress. But when the chips were down and Obama and Reid applied pressure, Webb folded.

The strangest thing, though, is that his floor speech made quite clear he knew he was doing the wrong thing and betraying his constituents. He said that day:

I do not believe that Congress should cede its authority over an issue as important as climate change to unelected officials of the Executive Branch. Without proper boundaries, this finding could be the first step in a long and expensive regulatory process that could lead to overly stringent and very costly controls on carbon dioxide and other greenhouse gas emissions. Congress-and not the EPA-should make important policies, and be accountable to the American people for them.⁵¹

Webb went on to specifically debunk all of the Democratic arguments against the resolution. He

argued passionately that Congress must stop the EPA .52 Then he voted not to. His decision not to run for reelection in 2012 is almost certainly motivated, at least in part, by his inability to explain away this betrayal of his states coal industry.

Contrast what Webb ended up doing with left-wing stalwart U.S. Sen. Jay Rockefeller of West Virginia, who made clear that he, unlike Webb and most other Democrats, would not allow the EPA to destroy his state's economic future. This is what he said:

*I have long maintained that the Congress-not the unelected EPA-must decide major economic and energy policy. EPA regulation will have an enormous impact on the economic security of West Virginia and our energy future. I intend to vote for Senator Murkowski's Resolution of Disapproval because I believe we must send a strong message that the fate of West Virginia's economy, our manufacturing industries, and our workers should not be solely in the hands of EPA.*⁵³

His statement was as true for the national economy as for the West Virginia economy.

The vote was fundamentally about one thing: who decides our economic future?

In our constitutional republic, the Congress of the United States is the legitimate legislative branch of government, charged with making the laws. A decision to adopt any national global warming program is an enormous one, with hundreds of billions of dollars and personal liberties at stake. This is simply not something that ought to be done through the back door via an unelected, unaccountable agency like the EPA.

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Excerpt provided by BenBella Books.

Untried Weapons — Repairing The Tattered Remains Of A Constitution That Has Not Been Tried And Found Wanting, But That Has Been Found Difficult; And Left Untried (Part 7) – Guest Essayist: David Eastman

Previous essays in this series explored why the Constitution is ineffective at restraining federal officials today, and illustrated how members of the present generation must come to view their relationship to the Constitution if it is to be of service in effectively limiting federal overreach. The most recent essay highlighted current efforts to amend the Constitution through an Article V convention. The series now concludes with another largely untried weapon in the citizen's arsenal today; issue-based legislative accountability.

A Deaf Congress

In 2014, researchers at Princeton University released the results of an exhaustive study that analyzed more than twenty years of federal policy. The study evaluated various actors and the effect that they had on public policy. After examining literally thousands of laws and how those laws came to be made, they were forced to admit that ‘the number of American voters for or against an idea has literally no impact on the likelihood that Congress will make it law.’ Specifically, they concluded that “the preferences of the average American appear to have only a miniscule, near zero, statistically non-significant impact upon public policy.” There are many reasons for this, not the least of which is that the level of political sincerity possessed by the average American today is miniscule, near zero, statistically insignificant.

In the last federal election, roughly 36% of Americans who could have voted, actually did vote. And in some states, that number dropped below 30%. The number of Americans whose level of conviction on political issues led them to take the step of contributing financially (\$200 or more) to an election was less than one quarter of one percent. When politicians assess the sincerity of most Americans on political issues, they quickly realize that most Americans don’t care, or—if they do care—they don’t care enough to actually do anything about it. Moreover, those who do vote, overwhelmingly vote for incumbents. The reelection rate for the House of Representatives was 95% in the last election, and over the last 50 years that rate has never fallen below 85%. No matter how critical Americans may feel about Congress as a whole, the sentiment in every part of the country tends to be “I don’t like Congress at all, but my own congressman isn’t so bad.” The knowledge that a member of Congress will be re-elected even after voting to pass widely unpopular legislation—like the Wall Street bailouts or the portions of ObamaCare which exempted members of Congress from the effects of the law—has effectively neutralized the single “most effectual” check against federal overreach designed by the Framers. Without citizens willing to hold public officials responsible for their actions in an election, the Constitutional framework totters and then falls. In Federalist #57, Publius removes all doubt that it could be otherwise:

“If it be asked, what is to restrain the House of Representatives from making legal discriminations in favor of themselves and a particular class of the society? I answer: the genius of the whole system; the nature of just and constitutional laws; and above all, the vigilant and manly spirit which actuates the people of America, a spirit which nourishes freedom, and in return is nourished by it. If this spirit shall ever be so far debased as to tolerate a law not obligatory on the legislature, as well as on the people, the people will be prepared to tolerate any thing but liberty.”

People or Process

Most plans to rollback federal overreach can be distinguished between plans to change the people in government—namely, the election of specific politicians—or plans to change certain aspects of the process, such as a constitutional amendment giving state legislatures the power to determine who will represent their state in the US Senate. Absent the political will to turn someone from office at election time, it can be tempting to seek process solutions, which do not require confronting a powerful incumbent at election time. It is a dodge of the real issue; whether

or not the elected official will be held accountable for the decisions that they made while in office.

One of the most popular instances of this dodge is the proposition that we can make government more accountable to the people by restricting the number of terms that an individual can serve in office. Admittedly, the idea has some appeal. At the time the Constitution was drafted, the various states employed a wide variety of restrictions on which officials could run for re-election and the circumstances under which they could do so. Knowing this, the absence of “term limits” in the Constitution is all the more remarkable. Federalist #72 offers several reasons for this, and the debates in the Constitutional Convention offer further reasons.

Nevertheless, in a time when government seems so unresponsive today, it would feel rather good to be able to impose a restraint upon it. But other than feeling good about ourselves, and feeling as though we’ve “done something” (the motivation behind many of the disastrous laws passed by Congress in recent years), when the actual effects of term limits are examined, many conclude that the effect on policy—and let’s make it clear here, the reason politics interests us in the first place is the affect that government has on our lives through actual policy—is often largely negative.

In Oklahoma, citizens fought hard for term limits. But once those term limits were in place, the average length of an incumbent’s time in office actually increased. (Incidentally, a thorough treatment of term limits is outside the scope of this article, but readers can find thoughtful commentary [here](#) and [here](#).) When they next sought to severely restrict the ability of the Oklahoma legislature to increase taxes, they collected more than 200,000 signatures, and launched a successful campaign that raised millions of dollars to enact the policy. Yet the legislature bypassed the restriction and now collects in excess of \$600 million dollars a year in “fees”.

The number of plans to make government more accountable through the changing of various processes are countless, but they all dodge the real problem; holding elected officials accountable for their actions while in office. Without a willingness to confront an incumbent with their record at election time, such plans often have the effect of reducing accountability rather than increasing it. Regardless of any short-term gains that may obtain from the new policy itself, they distract from the real work of bringing government officials to a place of accountability. Let there be no mistake—providing accountability is hard. It is for this reason that it is often the last weapon a citizen picks up in the battle against those who have cast off constitutional restraints.

The Failure of Reasonable People

“The ‘reasonable’ people’s failure is obvious. With the best intentions and a naive lack of realism, they think that with a little reason they can bend back into position the framework that has got out of joint. In their lack of vision they want to do justice to all sides, and so the conflicting forces wear them down with nothing achieved. Disappointed by the world’s unreasonableness, they see themselves condemned to ineffectiveness; they step aside in resignation or collapse before the stronger party.” (Dietrich Bonhoeffer)

The plain truth of the matter is that the challenges that confront us in the pursuit of constitutional government in America today are not reasonable. It is not reasonable to be told by the person third in line to the presidency that we must pass a federal law so that we can find out what is in the law. It is not reasonable that a Congressman should have to frequently sprint 500 yards to remind that person that ten congressmen does not a majority make. It is not reasonable that a single man should invalidate the vote of a majority of more than 5,000 elected delegates at a national convention. These things are not reasonable, but they happen, and will continue to happen until someone puts a stop to them.

“Constitutional conservatives have a big task in front of them. You’re disposed to be reasonable, to observe principles—and the principles enjoin you to give the other fella the benefit of the doubt—to include diverse opinions, and so forth. And you’re facing an enemy that wants to destroy you, personally and socially. You have to find a way to square that circle.” (David Horowitz)

It has been said by men of great renown that eternal vigilance is the price of freedom. It is indeed—But it is not the only price of freedom. “The price of freedom is the willingness to do sudden battle anywhere, any time and with utter recklessness.” (Robert A. Heinlein)

The responsibilities of self-government are not something that we can empower some other group, organization, or party to do for us. No major party is furthering the agenda of restoring constitutional constraints in our government, and in most parts of the country, no minor party is either. Some conclude from this that there is no hope, and in desperation pursue various schemes to amend the constitution; schemes that—even if successful—would do little to actually improve the quality of American government. All too often they begin by asking the wrong question. Instead of asking how we stop public officials from abusing their power while in office, it is often more instructive to sit back and seek to determine what it is that has thus far kept them from worse abuses.

It is true, among all of the many organizations involved in government and politics today, there is a paucity of organizations who take seriously the need to hold elected officials accountable for the consequences of their actions. And few of the organizations who do pursue that work possess the humility to give full credit to those who have slowly undermined our Constitution over the course of many years, and also possess the patience to commit to taking just as long, if not longer, to rollback those accomplishments. Nevertheless, though small in number, such organizations do exist. And they are demonstrating that there is reason for hope, as even small organizations can have a powerful impact when they accept the political realities of our day and venture forth to do battle all the same.

Taking a powerful incumbent head-on and reminding voters of the unsavory things he or she has done, or not done, is not easy. But self-government was never designed to be. And in the form of government handed down by the Framers there is no substitute for it. Elected officials must be confronted for their actions, and that confrontation should be both public and also painful for them. It should be sufficiently painful that they refrain from making that same mistake a second time. Let there be no mistake—the way in which we answer this crisis will determine whether we keep the Republic handed down to us by the Framers. If we do not keep it we have it on good

authority that John Adams at least will be repenting in heaven that they ever took half the pains to preserve it.

David Eastman is a graduate of West Point and a former Captain in the US Army. He has served at all levels of US government; city, county, borough, state and federal, and in each case was obliged to take an oath to support and defend the U.S. Constitution; He is a co-founder of Tax Our Kids, which advocates for sustainable government spending on behalf of future generations of Alaskans. He lives with his family in Wasilla, Alaska.

The “Living” Constitution – Guest Essayist: Will Morrissey

Contributors to this series of articles have shown that executive branch of the United States government, cheered on by Congress and the Supreme Court and abetted by what has become a fourth branch of government—the federal bureaucracy or administrative state—has for some time almost routinely overridden the separation of powers the Framers designed for the protection of American rights. In *The Federalist*, Publius had argued that the Constitution itself amounts to a bill of rights, preventing the usurpation of powers by the executive by giving the legislative and judicial branches powerful incentives to resist such encroachment.

Whether it is the Environmental Protection Agency ignoring Congress and issuing edicts on global warming, federal land grabs in Alaska, bureaucratic regulations on immigration, the confused and onerous burdens of the Common Core program in our schools or the Affordable Care Act in our hospitals and doctors’ office, warrantless surveillance of American citizens by the National Security Agency, partisan misuse of the Internal Revenue Service, or the overuse of Congressional-Executive agreements and sole executive agreements in lieu of treaties, these essays have described an executive and administrative power that no longer merely executes laws enacted by Congress but itself legislates, with or without Congressional organization, and often with no rebukes from a complaisant Supreme Court.

Why is this happening?

We can enter the trail at any one of the points listed, but let’s use the last one, the international “agreements” that have largely taken the place of treaties since World War II. Some fourteen years ago, John C. Yoo—then as now a professor at Berkeley Law School—wrote an illuminating article in the *Michigan Law Review* discussing the history of treaties and Congressional-Executive agreements.^[i] Yoo later on joined the George W. Bush administration in the Office of the Attorney General and authored rules governing the War on Terror and authorizing the use of “enhanced interrogation techniques” as one instrument of that war. So we aren’t talking about a man who could even remotely be called a libertarian when it comes to Constitutional law. This makes his work all the more useful for our purposes, exempt as it is from any suspicion that it was authored by an enemy of executive power.

Among the principal defenders of the constitutionality of such agreements, Yoo mentions Bruce Ackerman, Sterling Professor of Law and Political Science at Yale Law School and author of (among other books) *The Failure of the Founding Fathers*, *We the People: Foundations* and its sequel, *We the People: Transformations*. Ackerman argues for a constitutional theory that

combines the popular sovereignty of Senator Stephen Douglas with the Progressivism of Woodrow Wilson and such prominent recent Supreme Court Justices as William J. Brennan and Thurgood Marshall.

As Yoo documents the matter, between 1789 and 1839 the United States entered into sixty treaties and twenty-seven non-treaty international agreements. But “as the nation entered World War II... statutory devices or even unilateral executive action came to overwhelm the treaty process; from 1939 to 1989, we enacted 702 treaties but 11,698 non-treaty agreements. Writing in 2001, Yoo observes that almost all of these international agreements concerned trade (Bretton Woods, NAFTA, the WTO and the like), but such areas as arms controls treaties and treaties concerning the environment and human rights were still firmly under treaty law. Obviously, only a decade and a half later, this is no longer the case. Non-treaty agreements are now standard practice in all areas of international dealings, not only trade.

Ackerman applauds the trend. Reacting to the failure of the Versailles Treaty (with its concomitant League of Nations), progressives began a push to make international agreements legally equivalent to treaties. One might suppose that the Constitution would block any such effort, but not the Constitution in the hands of progressives. According to Ackerman, the 1944 election of Franklin D. Roosevelt not only gave popular endorsement to his intention to frame and participate in the new League-of-Nations substitute, the United Nations, but actually transformed the Constitution itself. The election, you see, was a *revolutionary moment* in which public opinion endorsed a fundamental change in Constitutional practice, entitling the executive and legislative branches to bypass the treaty-making power of the Constitution. By 1947, Ackerman claims, such “interchangeability” had “become part of the living Constitution”—the foreign-policy counterpart of the sweeping domestic constitutional changes wrought by FDR’s smashing victory in the 1936 election—which centralized power in Washington, thus compromising federalism and transferred a considerable part of lawmaking power from Congress to the administrative state now ensconced in the capital city. A “New Deal,” indeed.

But where does this notion of the “living Constitution” come from? And what does it mean? The

phrase predates the New Deal. It is first seen in Woodrow Wilson’s 1908 study, *Constitutional Government in the United States*, one of his last scholarly efforts before he left the presidency of Princeton College for the governorship of New Jersey and eventually for the White House. Wilson’s scholarship had long served the political agendum of progressivism, and *Constitutional Government* didn’t depart from that project. Like all progressives, Wilson maintains that each epoch of human history has had its own distinctive mindset, useful for that time but largely obsolete in subsequent times. If the Declaration of Independence said that all men are created equal insofar as they possess the unalienable rights of life, liberty, and the pursuit of happiness, well, that “leaves to each generation of men the determination of what they will do with their lives, what they will prefer as the form and object of their liberty, in what they will seek their happiness.” As “history” works itself out, through the generations, “leaders” arise to guide them. “A living people needs not a master but a leader”; fortunately, “great passions, when they run through a whole population, inevitably find a great spokesman.” Whereas the Founders had so structured government as to refine and enlarge the public views—to make self-government reasonable government—Wilson is confident that *passions* will bring a people

greatness. The leader is the most articulate spokesman for the ruling passion of his time.

Specifically, in this new, twentieth century we must abandon the Constitutional theory of the Founders. “The makers of the Constitution constructed the federal government upon a theory of checks and balances which was meant to limit the operation of each part and allow to no single part or organ of it a dominating force; but no government can be successfully conducted upon so mechanical a theory.” Rather, we need a government in which a leader may “bring the several parts of government into effective cooperation for the accomplishment of particular common objects—and party objects at that.” The mechanical theory of the Founders derived from the natural-science mechanics of Isaac Newton. But “in our own day, whenever we discuss the structure or development of anything, whether in nature or in society, we consciously or unconsciously follow [Charles] Darwin,” not Newton. Gravitation and the image of planets in orbit have given way to a view of nature that has become *historicized* or progressive—evolutionary, not stable.

Here is where the “life” of the “living” Constitution comes in. “The trouble with the [Newtonian] theory [of the Founders] is that government is not a machine, but a living thing. It falls, not under the theory of the universe, but under the theory of organic life. It is accountable to Darwin, not Newton.... Living political constitutions must be Darwinian in structure and in practice.” The Constitution “is a vehicle of life, and its spirit is always the spirit of the age”—evolving, developing, aiming at ever-superior life-forms. History—now conceived as ever-evolving toward better forms of society—becomes a series of Ackerman-ish “revolutionary moments.”

To Wilson, this fits exactly with approval of government as primarily an *executive*—that is to say, a presidential—affair. The president represents the ruling political party, itself on the cutting edge of historical progress as demonstrated by its electoral success, its ability to capture the ruling passion of popular opinion. “He is also the political leader of the nation.” “The President is at liberty, both in law and conscience, to be as big a man as he can. His capacity will set the limit.” In particular, he enjoys “very absolute” control over foreign policy.

In Wilson’s constitutional—some might say “anti-constitutional”—theory we see the genesis of government by executive leadership. Buttressed by a professional bureaucracy staffed by men and women adept at “the science of administration”—the title of then-professor Wilson’s most important early essay—the president becomes the good shepherd of the spirit of the age, sharing our current ruling passion, leading us ever closer to the final “end” of historical progress, that land of peace and prosperity that will leave all of our passions satisfied, all of our dreams fulfilled.

If Americans today find themselves perplexed at government by executive orders and executive “agreements,” it is only because they’ve not seen how such government was carefully prepared by men like Wilson and Franklin Roosevelt, and not in some secret place as a part of some dark conspiracy, but openly and in print in writings that often date back more than a century. The essays here at Constituting America—on the Constitution itself and *The Federalist*—outlined what the Founders gave us: the framework of self-government for the American people. Now, this series on executive power illustrates how this framework has been dismantled and replaced by advocates of what has been variously called “The New Freedom” (Wilson), the *New Republic*

(journalist Herbert Croley), the *New Deal* (FDR), the *New Frontier* (JFK), the *Great Society* (LBJ), the *New Spirit* (Jimmy Carter), and finally a movement of “Hope and Change” (Barack Obama). New and great, hopeful and ever-changing, because some of us suppose that they know those old Constitutional principles to be obsolete, and that they know further—and better than we do—how to lead us into the Future.

Will Morrissey holds the William and Patricia LaMothe Chair in the United States Constitution at Hillsdale College; his books include Self-Government, The American Theme: Presidents of the Founding and Civil War and The Dilemma of Progressivism: How Roosevelt, Taft, and Wilson Reshaped the American Regime of Self-Government.

[i] John C. Yoo: “Laws as Treaties: The Constitutionality of Congressional-Executive Agreements.” *Michigan Law Review*, Vol. 99, February 2001, pp. 757-852.

The Federal Fruit and Vegetable Cartels - Guest Essayist: Daren Bakst

If you grow fruits and vegetables, the federal government [might limit](#) how many fruits and vegetables you can sell. Some raisin growers learned this the hard way when they were fined by the United States Department of Agriculture (USDA) for not turning over part of their crop to the federal government.

This year, the United States Supreme Court in [Horne v. USDA](#) decided this “raisin case,” holding that under the [Fifth Amendment](#), the federal government was taking the raisins and therefore must provide just compensation to the raisin growers.

While an important victory for property rights, raisin growers may still be subject to USDA meddling into their sales. On a [USDA web page](#), they acknowledge that the raisin supply restrictions will be amended in light of the *Horne* case. The agency could be trying to figure out a new way to restrict the sale of raisins.

It is shocking that a farmer can’t make an honest living selling a legal product without the federal government coming in and telling them how much they can sell. This is reality though. It’s also not just a raisin problem, but much broader. These supply restrictions are the result of what are known as marketing orders.

The Agricultural Marketing Agreement Act of 1937 authorizes the use of fruit and vegetable marketing orders. These New Deal programs attempt to create stable markets for certain commodities. Marketing orders, among other things, authorize research and promotion of commodities, establish minimum quality standards, and sometimes limit supply through volume controls (i.e. supply restrictions).

They are [initiated](#) by industry and must be approved by two-thirds of growers. The government acts as the enforcer for industry, requiring everyone affected by a specific order to abide by its legally enforceable provisions. In this way, industry members use government compulsion rather

than private cooperation to maintain “order” in the marketplace. It doesn’t matter if a covered grower doesn’t support the marketing order or didn’t vote for it, they have to abide by its terms.

The USDA gives its blessing to these fruit and vegetable cartels, which would likely violate federal antitrust law absent government intervention. The industry leaders running these cartels are seeking to benefit the industry, and more likely specific members of the industry. The interests of consumers are of little to no concern.

Currently, there are [28 fruit and vegetable marketing orders](#). Of these, 10 have authorized supply restrictions. Only two have supply restrictions that are active (i.e. in effect): spearmint oil and tart cherries. This low number of active supply restrictions is evidence that they are unnecessary; 26 of 28 marketing orders don’t have active supply restrictions.

While supply restrictions may be the most egregious aspect of marketing orders, these orders in general are the problem. Nobody should be forced to be part of any association of individuals, including these cartels. These orders are egregious, plain and simple. Even two Supreme Court justices not necessarily known as free market champions captured the absurdity of marketing orders.

The first time the *Horne* case came to the Court (it came twice), Justice Elena Kagan [quipped](#), “And now, the Ninth Circuit can go and try to figure out whether this marketing order is a taking or it’s just the world’s most outdated law.”

And Justice Sonia Sotomayor, who held that the government had not actually taken the raisins, noted in her [dissent](#): “The Order may well be an outdated, and by some lights downright silly, regulation. It is also no doubt intrusive.”

These orders are outdated, silly, and intrusive. Worse though, they are completely counter to the idea of a free society where Americans have the [unalienable rights](#) of life, liberty, and the pursuit of happiness. The USDA may implement these orders, but it is Congress that gave the agency the green light to wield this incredible power. Only Congress can fix this situation.

Daren Bakst is the Research Fellow in Agricultural Policy at The Heritage Foundation. Bakst frequently submits comments to regulatory agencies and has appeared in or been quoted by a wide range of media outlets such as The Wall Street Journal, USA Today, The Washington Times, CNN, Fox Business News, Al-Jazeera America, and U.S. News and World Report. A licensed attorney, he holds a law degree from University of Miami and a master of laws degree from American University.

House Litigation Seeks To Defend The Constitution – Guest Essayist: The Honorable John Boehner, 53rd Speaker Of The U.S. House Of Representatives

On September 17, Americans will observe the 228th anniversary of the adoption and signing of the U.S. Constitution by the Constitutional Convention. I commend Janine Turner, Cathy Gillespie and everyone associated with Constituting America for their efforts to defend our Constitution and educate people about its foundational significance. Also, I am humbled to accept their gracious invitation to participate as an essayist in this year's 90 Day Study on executive overreach.

Author James D. Best opened an essay in this series with the following: "Concentrated political power frightened the Founders. They especially feared unrestrained executive power." This fear of unrestrained power is not something limited to the Founders and accurately describes actions taken by the House of Representatives with regard to ObamaCare.

Since 2011 the House has acted repeatedly to repeal, defund, or otherwise chip away at that law which has driven up health care costs, left millions without coverage, and wreaked havoc on our economy. I would note that some of these actions have actually become law, such as the repeal of onerous small business mandates, the elimination of ObamaCare slush funds, and a prohibition on funds for the law's insurance "risk corridors." And a new GOP initiative was just signed into law, the Hire More Heroes Act, which repealed ObamaCare mandates that made it harder for employers to hire our veterans.

However, we've still got plenty of work to do. The sheer size of ObamaCare, with its thousands of pages and mountains of attendant regulations, has provided the executive branch ample opportunity to abuse and extend its authority in ways not envisioned by our Constitution. Some of these steps were and are so problematic that a House majority has taken an unprecedented step to stop them – filing a lawsuit against the Obama administration – in addition to our legislative efforts.

On July 30, 2014, the House approved H. Res. 676 authorizing the body to enter into litigation to oppose President Obama's attempts to become a law unto himself. The President has rewritten many laws, ignoring the will of the American people and the Constitution. Dozens of these actions involve ObamaCare. The House's unprecedented litigation, the first of its kind in American history, challenges two egregious examples undermining the separation of powers.

The House's lawsuit against the administration, *House v. Burwell* (after HHS Secretary Sylvia Burwell), addresses two specific unilateral executive actions on ObamaCare. The first is President Obama's unilateral decision to twice waive the law's employer mandate and the penalties for failing to comply with it without going through Congress. The president's actions delaying the employer mandate directly contradict the clearly written language of the health care law.

The second component of the suit challenges the administration's unlawful giveaway of

approximately \$175 billion to insurance companies. According to the Congressional Budget Office (CBO), the administration is scheduled to make payments of \$175 billion over the next 10 years to insurance companies under an HHS-based, ObamaCare cost-sharing program. But Congress has refused to fund this cost-sharing program. To circumvent the will of Congress, the administration is instead unlawfully and unconstitutionally using funds from a separate Treasury Department account – authorized for other purposes – to pay insurance companies. These funds were never appropriated, so the administration is using taxpayer funds from a separate account, subverting Congress’s “power of the purse” under Article I, Section 9 of the Constitution. This is clearly unconstitutional.

In March a Federal District Court began proceedings to determine whether the House had legal standing before the court. The House argued in its brief that the administration has “acted without Congress” and has effectively rewritten statutory provisions not to their liking. “Those actions,” we argued “strike at the very heart of the House’s express Article I legislative and ‘guardian of the purse’ powers.” Further, these actions would “enlarge the power of the Executive to dangerous levels... Such a concentration of unchecked power in one branch is precisely what the Framers sought to avoid...”

In late May oral arguments were heard. The House’s lead counsel on the case, constitutional law scholar Jonathan Turley, noted in a blog post at that time that the violations listed in the House litigation “run to the very foundation of the separation of powers doctrine that underpins our entire system of government because they usurp Congress’s powers to appropriate funds and to legislate.”

A ruling on standing is expected in the coming months and I remain hopeful that the court will rule in our favor. While there have been other legal challenges to ObamaCare, this case will test the separation of powers with regard to the law’s implementation. Much is at stake.

The idea of temporal or governmental power having defined limits is a bedrock of Western Civilization and can be traced all the way back to Magna Carta, a document whose 800th anniversary we celebrate this year. Magna Carta, boiled down to its essence, clarified in written word that a monarch had limited power. It was upon the foundation of Magna Carta that our Founders constructed our Constitution. Having thrown off the tyranny of a king, the Founders built a system that placed limits to those elected by the people.

The House will simply not allow these ideas to fall by the wayside. We stand on solid constitutional ground and with the witness of history to the terrible consequences of unchecked power.

We are unwilling to let any president choose what laws to execute and what laws to change. And, we are unwilling to let anyone tear apart what our Founders built.

The Honorable John Boehner represents the 8th Congressional District of Ohio, and is serving in the 114th Congress as the 53rd Speaker of the U.S. House of Representatives.