

Enforcing the President's Constitutional Duty to Faithfully Execute the Laws

Testimony of Representative Ron DeSantis 2-26-2014

It is often said that ours is a “government of laws, not of men.” If there is any one principle that embodies this maxim, it is the constitutional separation of powers.

The framers of the Constitution considered the protection of individual liberty to be the primary function of government. They designed the Constitution so that the major delegated powers – legislative, executive and judicial – were lodged in separate branches of government.

Article I of the U.S. Constitution states: “All legislative powers herein granted shall be vested in a Congress of the United States.” The Constitution delegates no legislative authority to the President; instead, Article II, Section 3 of the Constitution imposes upon the President the duty to “take care that the laws be faithfully executed.” Under our Constitution, the President cannot amend, suspend or ignore duly-enacted, constitutionally-valid laws but must instead faithfully execute the laws on the books.

Yet, in a number of areas ranging from welfare work requirements to illegal immigration to ObamaCare, the current chief executive has failed to fulfill this important and long-standing duty to take care that the laws be faithfully executed.

The justifications that have been offered in defense of the President's conduct by his political supporters have ranged from weak to completely baseless.

First, the fact that some past Presidents have issued more executive orders than the current incumbent is irrelevant to the issue at hand. The number of executive orders does not tell us anything about their constitutional propriety. A President could issue hundreds of executive orders about rudimentary executive branch business as authorized by law and not threaten the constitutional order at all, while an executive that issued merely a handful of executive orders could pose a real threat to liberty if those orders exceed the boundaries set by the law and Constitution.

Second, concern for executive branch lawlessness is not limited to (or even primarily concerned with) formal executive orders. The suspension of ObamaCare's employer mandate, for example, was done not through executive order but via a blog post on a Department of Treasury website. When the President purported to “extend” the ObamaCare grandfather provisions last November, he issued a statement from the White House press room but did not promulgate a formal executive order.

Third, it is not correct to say that the President can simply do what he wants unless and until a court stops him. Article III courts are limited to deciding concrete cases and

controversies. The Framers did not expect courts to referee disputes regarding the separation of powers between the Congress and the President absent the existence of a concrete legal case.

As James Madison argued in *The Federalist* No. 51, the Framers designed the system so that ambition would counteract ambition; that is, they expected members of Congress in both the House and the Senate to place the institutional interests of the legislative branch ahead of their personal political interests and to check the executive when he attempted to usurp legislative authority.

Fourth, the President's constitutional authority as commander-in-chief of the armed forces is qualitatively different than the President's obligation to enforce domestic law. Presidents such as Abraham Lincoln and Franklin Roosevelt have exercised Article II authority during wartime in a manner which still provokes considerable controversy. The scope of the commander-in-chief power is important but also inapposite to whether the current incumbent is satisfying the Take Care Clause by faithfully enforcing domestic laws regarding issues such as health care, immigration and welfare.

Finally, the Supreme Court decision in *Heckler v. Chaney*, 470 U.S. 821 (1985) does not justify the President's conduct. That case involved a lawsuit filed by death row inmates who claimed that federal law compelled the Food and Drug Administration to review the drugs that state officials were planning to use to kill them via lethal injection. The Court sensibly recognized that, given limited resources, the executive branch has the discretion to prioritize enforcement actions. Possessing the discretion to prioritize how to enforce a statute does not mean the president possesses the ability to decide whether to enforce a statute at all.

As the Supreme Court observed in *Kendall v. United States*, 37 U.S. 524 (1838), "[t]o contend that the obligation imposed on the president to see the laws faithfully executed implies a power to forbid their execution is a novel construction of the Constitution, and is entirely inadmissible."

I think the President's conduct needs to be scrutinized by the American people. That's why I recently introduced the Faithful Execution of the Law Act. Currently, the Attorney General is required to report to Congress any time the Department of Justice stops enforcement of a law on the grounds that it is unconstitutional. My bill strengthens this provision by extending this reporting requirement to include any federal officer who implements a formal or informal policy of non-enforcement, regardless of whether it is being done on constitutional or policy grounds.

My hope is that this sunlight will prove to be a disinfectant that will serve to hinder the President from usurping the authority of Congress.

The President is not a king. We are supposed to be a government of laws, not of men. The framers designed the Constitution to establish a system based on the rule of law in order to

protect the liberty of the people. We in Congress have an obligation to use our authority to vindicate the intent of our founders and to check this ambitious executive.