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Will Obama's overreach be policed?

George F. Will

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During Watergate, Henry Kissinger's mordant wit leavened the unpleasantness: "The illegal we do immediately; the unconstitutional takes a little longer." President Obama often does both simultaneously, using executive authoritarianism to evade the Constitution's separation of powers and rewrite existing laws.

Last week, however, the Supreme Court took a perhaps momentous step toward correcting some of the constitutional vandalism that will be Obama's most significant legacy. The court agreed to rule on Obama's unilateral revision of immigration law.

Seeking re-election in 2012, Obama stretched the idea of "prosecutorial discretion" -- supposedly "on an individual basis" -- to cover a delay in efforts to deport approximately 770,000 persons who were brought to America illegally as children. But he said that with this he had reached the limit of his powers: "If we start broadening 1/8 this executive action 3/8, then essentially I would be ignoring the law in a way that I think would be very difficult to defend legally."

In 2014, however, he expanded the sweep and protections of that program. His executive fiat would have shielded perhaps 4.5 million illegal immigrant adults with children who are U.S. citizens or lawful residents. His expansion made them eligible to work and receive Social Security retirement and disability benefits, Medicare, the earned income tax credit, unemployment insurance, driver's licenses, etc.

Led by Texas, a majority of states (26) asserted standing to sue because of the costs of complying with the new policy. When they won an injunction, the Obama administration appealed to the 5th Circuit Court of Appeals. It lost there, too, and then asked the Supreme Court to rule on the legality of Obama's action. The court should not, and probably will not, rule for the president.

The court has asked to be briefed on a matter the administration must be reluctant to address; the Justice Department requested that the court not insert a "constitutional question" into the case. The question the court will consider is: Did Obama's action violate the Take Care Clause?

Obama has sworn to "preserve, protect and defend the Constitution," which says the president shall "take care that the laws be faithfully executed." Josh Blackman of the South Texas College of Law in Houston and adjunct scholar at the Cato Institute in Washington says that only three times has the court relied on the Take Care Clause to limit executive actions, and the justices have never asked for a briefing on this clause.

In their brief, the states argue that “Congress has created a detailed, complex statutory scheme for determining” who qualifies for “lawful presence” in this country. No statute empowers the executive to grant this status to any illegal immigrant it chooses not to deport, let alone to confer “lawful presence” status on a class of many millions.

The states say presidents cannot “change an alien’s statutory immigration classification.” So, Obama is not merely exercising discretion in enforcing the Immigration and Nationality Act. He is altering this act so that previously prohibited conduct no longer violates the act.

Executive overreach has been increasing for decades. For example, although the Troubled Asset Relief Program (TARP) was for financial institutions, the George W. Bush administration diverted more than \$17 billion for auto companies. Obama’s usual justification for his unusually numerous unilateral legislating is that Congress refuses to act on this or that subject. But regarding who qualifies for legal status and for the right to work, Congress has acted with notable specificity. Obama simply wants to grant to millions of people various benefits in violation of Congress’ will as written into law.

For seven years, Obama has treated the Take Care Clause as a mild suggestion. He considers it insignificant compared to his virtuous determination to “work around” Congress in order to impose his policies regarding immigration, health care, education, contraception, welfare, gun control, environmentalism, gay rights, unauthorized wars and other matters.

Both leading Democratic presidential candidates praise Obama’s radical understanding of the Constitution’s Article II presidential powers. The leading Republican candidate would replace the Constitution’s 7,591 words with the first-person singular pronoun: He promises many unilateral presidential wonders, including a global trade war and a more holy national vocabulary: “If I’m president, you’re going to see ‘Merry Christmas’ in department stores.”

But no Obama executive order has yet repealed Article III’s judicial powers. So, come June we will learn whether the judicial branch will do its duty by policing the borders of the separation of powers.