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Is Trump Restoring Separation of Powers?

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Our Constitution carefully separates the legislative, executive, and judicial powers into three separate branches of government: Congress enacts laws, which the president enforces and the courts review. However, when all of these powers are accumulated "in the same hands," James Madison warned in Federalist No. 47, the government "may justly be pronounced the very definition of tyranny." The rise of the administrative state over the last century has pushed us closer and closer to the brink. Today, Congress enacts vague laws, the executive branch aggrandizes unbounded discretion, and the courts defer to those dictates. For decades, presidents of both parties have celebrated this ongoing distortion of our constitutional order because it promotes their agenda. The Trump administration, however, is poised to disrupt this status quo. In a series of significant speeches at the Federalist Society's national convention, the president's lawyers have begun to articulate a framework for restoring the separation of powers: First, Congress should cease delegating its legislative power to the executive branch; second, the executive branch will stop using informal "guidance documents" that deprive people of the due process of law without fair notice; and third, courts should stop rubber-stamping diktats that lack the force of law.

Executive power is often described as a one-way ratchet: Each president, Democrat or Republican, augments the authority his predecessor aggrandized. These three planks of the Trumpian Constitution — delegation, due process, and deference — are remarkable, because they do the exact opposite by ratcheting down the president's authority. If Congress passes more precise statues, the president has less discretion. If federal agencies comply with the cumbersome regulatory process, the president has less latitude. If judges become more engaged and scrutinize federal regulations, the president receives less deference. Each of these actions would weaken the White House but strengthen the rule of law. To the extent that President Trump follows through with this platform, he can accomplish what few (myself included) thought possible: The inexorable creep of the administrative leviathan can be slowed down, if not forced into retreat.

CONGRESS SHOULD CEASE DELEGATING LEGISLATIVE POWER TO THE EXECUTIVE BRANCH The Federalist Society for Law & Public Policy Studies is the leading organization for conservative and libertarian lawyers interested in the current state of the legal order. I joined when I was in law school, and I frequently speak at their events. Trump calls for border wall after US patrol agent killed 00:04 00:38 Powered by Every November, the Federalist Society holds its annual meeting in Washington, D.C. But this year, the gathering had a highly

unusual dynamic. It is common for scholars to criticize Congress for delegating its power to the executive branch, a violation of what is known as the non-delegation doctrine. It is unprecedented for the executive branch to share that concern. In a keynote speech, Don McGahn, who serves as White House counsel, lamented the fact that Congress gives the White House too much power. "Often Congress punts the difficulty of lawmaking to the executive branch," he said, "then the judiciary concedes away the judicial power of the Constitution by deferring to agency's interpretation of what Congress's vague statutes."

One would think that a lawyer for the president would relish this abdication by Congress and the courts. But no. Instead, McGahn praised a recent concurring opinion by Justice Thomas, in which Thomas "called for the non-delegation doctrine to be meaningfully enforced" to prevent the "unconstitutional transfer of legislative authority to the administrative state." Again, reflect on the fact that if Justice Thomas's position gained four more votes, much of Congress's legislation — which carelessly lobs power to the White House with only the vaguest guidelines — would no longer pass constitutional muster. Though, to be frank, there is no need to rely on the Supreme Court to enforce the non-delegation doctrine. The president has the power to veto half-baked legislation. (Recall what Speaker Nancy Pelosi said of Obamacare: "We have to pass the bill so you can find out what is in it.") If Trump returned a bill to Congress, stating in his message that it failed to include sufficient guidelines, there would be a paradigm shift in Washington, D.C. Both Republicans and Democrats would have to go back to the drawing board and relearn how to legislate with more precision. This process would strengthen the rule of law. Or Congress could simply override the veto and reaffirm that it has shirked its constitutional responsibility and could not care less about what this president, or any president for that matter, actually does.

THE EXECUTIVE WILL STOP DEPRIVING PEOPLE OF DUE PROCESS OF LAW WITHOUT FAIR NOTICE The problems of the administrative state extend far beyond Congress's delegations. During his address, McGahn deplored the very bureaucracy his boss presides over. "The ever-growing unaccountable administrative state," he warned, "is a direct threat to individual liberty."

To be sure, the president cannot remove the heads of so-called "independent" agencies, such as the Federal Trade Commission or the Securities and Exchange Commission. Over the rest of the executive branch, in theory at least, the president should have complete control. But such is not the case. Over a half century ago, Justice Robert H. Jackson observed that the administrative state had grown into a "veritable fourth branch of the Government, which has deranged our three-branch legal theories." Citing Jackson's wisdom, McGahn explained that the administration will take steps to rein in this unruly power. "The Trump vision of regulatory reform," he said, "can be summed up in three simple principles: due process, fair notice, and individual liberty." Generally, when an administrative agency wants to affect a person's liberty or property, it must go through a fairly complicated and cumbersome process that seeks public input. (Whether or not that input makes any difference is a different story.) However, in recent decades, administrations of both parties have sought to bypass this process through the use of so-called "sub-regulatory actions." By issuing memoranda, guidance documents, FAQs, and even blog posts, agencies have avoided the need to formalize their rules. Yet they still expect Americans to comply with these transitory documents or face ruinous fines or even litigation. In

particular, during the Obama administration, the Department of Education used "Dear Colleague" letters to deprive students of due process on college campuses. McGahn called these missives "Orwellian." And he's right. In September, Betsy DeVos, the secretary of education, rightfully rescinded these guidance documents, announcing that "the era of rule by letter is over." The DOJ will cease issuing guidance documents that effect a change in the law. More recently, in another speech at the Federalist Society meeting, Attorney General Jeff Sessions announced that his agency will cease issuing guidance documents that effect a change in the law. Under the leadership of Associate Attorney General Rachel Brand, who also spoke at the convention, the Justice Department will review existing guidance documents and propose modifying or even rescinding some. "This Department of Justice," Brand said, "will not use guidance documents to circumvent the rulemaking process, and we will proactively work to rescind existing guidance documents that go too far." This is a remarkable and refreshing position, as it retroactively and prospectively constrains the ability of the Justice Department to expand its own authority. Depending on how rigorous the review of past guidance documents is, we could actually see a contraction of the administrative state. In Federalist No. 51, James Madison wrote of the "great difficulty" in framing a government: "you must first enable the government to control the governed; and in the next place oblige it to control itself." Here, the DOJ is tying itself to the mast to prevent further erosions of the rule of law.

No doubt, this process will be met with resistance from within, as bureaucrats tend to protect their ossified levers of power. An energetic executive, however, can clear out what McGahn referred to as "regulatory sediment." As it stands now, this policy applies only to the Department of Justice. It could be expanded to reach the entire executive branch, under the auspices of the little-known but powerful Office of Information and Regulatory Affairs. Neomi Rao, who heads OIRA, suggested during the Federalist Society convention that such a review could be implemented for independent agencies as well. (Christopher DeMuth wrote about this proposal in the Wall Street Journal.) Though the Supreme Court has held that the president lacks the power to remove the heads of these commissions, there is an open question about the extent to which the president can control their regulatory agenda.

COURTS SHOULD STOP RUBBER-STAMPING REGULATIONS THAT LACK THE FORCE OF LAW There is one final but imperative aspect of the Trumpian Constitution: the judiciary. During the 2016 campaign, then-candidate Trump released a list of possible nominees to fill Justice Scalia's seat. At the time, I wrote on NRO, "I have expressed my serious doubts about Mr. Trump's vision of constitutional law, but so long as he sticks with this list, I remain cautiously optimistic." Stick with the list he did, and then some. In addition to his nomination of Neil Gorsuch to the Supreme Court, the Trump administration has set a modern-day record for the number of district- and circuit-court judges confirmed in the first year. More important, the White House is not taking any chances with these picks. McGahn noted that "they all have paper trails, they are sitting judges, there's nothing unknown about them. What you see is what you get." And there has been a pervading philosophical consistency to these nominees. McGahn stated it bluntly: "We are committed to nominating and appointing judges that are committed originalists and textualists." In a not-too-subtle jab at Chief Justice Roberts, McGahn noted, that his office is seeking judges who "possess the fortitude to enforce the rule of law without fear of public pressure," for "judicial courage is as important as judicial independence." Trump is

looking for "strong and smart judges." (In 2015, Randy Barnett and I offered similar guidance to improve the judicial selection process).

These criteria will, by necessity, exclude the sort of judges who would rubber-stamp vague delegations of authority enforced by guidance documents that lack the force of law. "The greatest threat to the rule of law in our modern society," the White House counsel argued, "is the ever-expanding regulatory state and the most effective bulwark against that threat is a strong judiciary." To McGahn, "the Court should view agencies' claims of sweeping authority with skepticism, not nonchalance in the first step to preserving individual liberty in the face of the burgeoning federal Leviathan."

The president has taken proactive steps not only to limit its own power, but also to institutionalize restraints on future presidents who may see things very differently. Recruiting judges who share these beliefs will no doubt promote a more active judiciary, quite the opposite of the longstanding — and vapid — mantra of judicial "restraint." Indeed, three decades ago, the Reagan administration championed the so-called Chevron doctrine, whereby judges will uphold the executive branch's reading of an ambiguous law so long as that reading is "reasonable" (that is, not arbitrary). The Trump administration has now called for ending the Chevron doctrine and eliminating this judicial abdication. By making such strong nominations, the president has taken proactive steps not only to limit its own power, but also to institutionalize restraints on future presidents who may see things very differently. Look no further than Justice Gorsuch. In his address to 2,000-plus members of the Federalist Society packed into Union Station, the junior justice celebrated that "originalism has regained its place and textualism has triumphed." The 50-year-old declared, "neither is going anywhere on my watch." Providing a roadmap for the years and decades ahead, Gorsuch recalled that the courts have "managed to reenter the field of regulating interstate commerce," an area long thought to be beyond the judicial competence. "Why can't they reenter the field of delegation?" Gorsuch asked. "Our founders did not approve of lawmaking by bureaucrats by fiat," he noted. There is a danger, Gorsuch warned, when courts "combined delegation and deference." He's right. Deference only works when Congress — and not the executive branch — is in charge of the lawmaking process.

I still harbor deep concerns about the rule of law in America today. As reflected solely by President Trump's Twitter feed, I worry about his inappropriate attacks on the judiciary, calls for the prosecution of his political opponents, taunts of foreign dictators, delegitimization of the press, and failure to address sexual and other improprieties in his own party, to say nothing of our stark policy differences. With respect to the separation of powers, however, if the Trump administration actually follows through on its promises concerning delegation, due process, and deference, there will be a sea change in how the administrative state functions. Indeed, each of these actions will, ironically enough, weaken the executive and restore the separation of powers in the long run. That alone would be a remarkable disruption of the status quo. — Josh Blackman is a constitutional-law professor at the South Texas College of Law in Houston, an adjunct scholar at the Cato Institute, and the author of Unraveled: Obamacare, Religious Liberty, and Executive Power.

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