



Our republic, can we keep it?

Trevor Burrus

September 10, 2020

On Sept. 17, 1787, while leaving the just-finished Constitutional Convention in Philadelphia, Benjamin Franklin was purportedly asked whether the delegates had produced a republic or a monarchy. He allegedly said, "A republic, if you can keep it." Now, 233 years later, our constitutional republic has been substantially eroded. It is time to rediscover the founding principles of our Constitution if we want to last an additional 200 years.

The current violent clashes in our streets have many causes, but they are partly about what kind of country each side desires.

While American elections are rarely as existentially threatening as pundits and partisans claim, it's understandable why people feel this way. Congress has basically been a do-nothing body for more than a decade. The presidency has become the focal point of policy making and policy change in the federal government. Who the president is matters more now than ever before.

But it wasn't supposed to be this way. To the framers, Congress was the central player in our federal government. Due to their frequent popular election by relatively small and homogenous constituencies, members of the House would help harmonize the interests of the country by vigorously fighting for both local and national interests. Senators, who in the original Constitution were chosen by the state legislatures, would compose the senior deliberative body, which, because of the longer terms and statewide constituencies, would look more toward the long-term health of the country.

Seemingly no framer imagined, however, that Congress, rather than jealously guarding its power, would freely and gladly give it to the executive branch. Over the last 90 years, Congress has passed statute after statute that empower the executive branch with immense discretion not only on how the laws will be enforced (the classic role of the executive branch) but even what the laws say.

This was on display when President Donald Trump imposed steel tariffs by claiming they are in the interests of "national security." While the Constitution explicitly gives Congress the power to "regulate commerce with foreign nations," the Trade Expansion Act of 1962 delegated a significant amount of that power to the president by allowing him to unilaterally regulate foreign commerce in the interest of "national security." In other words, Congress gave away its power to the president, and courts have generally refused to step in to assess whether something is truly a danger to "national security."

But an overly powerful executive branch is not just a feature of the Trump administration. Trump inherited the stunningly broad powers of the presidency because almost every past administration has increased the scope of presidential power. The Obama administration purported to redefine

the concept of gender when it came to public school bathrooms by publishing a “dear colleague” letter instructing schools to let students use the bathroom of their gender identity. As a supporter of transgender rights, I was nevertheless shocked the administration would so casually force such broad social change. Transgenderism and bathrooms is the type of issue that should be debated in Congress, not imposed by the president.

But Congress doesn’t work, so we’re left with a president who has powers that even King George III didn’t have. No wonder people view a presidency of “the other side” as an existential threat. Under current law, an opposing president can switch significant environmental regulations, impose “national emergencies” to solve pet projects, radically restructure immigration, significantly alter regulations on businesses and even fight undeclared wars, all without asking Congress to do anything.

This is no way to run a constitutional republic. Although today the Bill of Rights is the most well known part of the Constitution, when the delegates left the Convention there was no Bill of Rights. The debates in the convention were about constitutional structure — how the separation of powers, checks and balances and other guardrails of the Constitution could ensure a limited, effective, responsive and democratically accountable federal government. Now, too many of those guardrails are either broken or completely disregarded. In a country as big and diverse as America, we cannot continue to exist in a state of perpetual presidential whiplash.

Our republic is eroding. Can we stop it?

Trevor Burrus is a research fellow in the Cato Institute’s Robert A. Levy Center for Constitutional Studies and editor in chief of the Cato Supreme Court Review. He wrote this for InsideSources.com. Distributed by Tribune Content Agency, LLC.