

THE EMPORIA GAZETTE

An Imperial Presidency?

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“To crush your enemies, see them driven before you, and to hear the lamentations of their women.”

Conan the Barbarian (Responding to the question of what is best in life)

I'm sure there are some Gazette readers who think I'm a fool for letting my religious views creep into the ballot box with me. I have no defense. I'll maintain my right to be a fool. I realize that being a fool swimming against the tide of all the superior wisdom around me could be dangerous, but I'll take the risk.

It's now the middle of March. When June rolls around the Supreme Court will render its decision on the Affordable Care Act. Judging by the apoplectic response of progressives to the three days of argumentation, supporters of the Administration are worried. The president was clearly concerned. Declaring that the Supreme Court was treading on dangerous ground if they thought of overturning a law that had passed by a solid majority, he laid down the gauntlet. Some scholars are speculating that his comments were aimed at Justice Anthony Kennedy, who is considered to be the swing vote. Some say the president's comments were nothing more than an unfortunate slip of the tongue.

I think there's more to it. It's a matter of power, with a bit of deceit mixed in.

Was the president telling the truth when he warned the justices that the law had passed by a solid majority? The final vote was 219-212. Further, it took some back room wheeling and dealing with six pro-life Democrats to win final passage. How did he get their support? By telling them he would draft an executive order prohibiting public funding of abortion. I don't think fifty years from now the president's signature would be worth a nickel on the Antiques Roadshow.

The only remaining hurdles are nine judges. The president knows that the Supreme Court has the authority to overturn the law and its individual mandate. He studied law at Harvard. He's well aware of *Marbury v. Madison*. This isn't about knowledge or instruction. It's about power and intimidation.

Alexander Hamilton understood this. Here are some of the things he had to say about the Supreme Court in Federalist 78: “The judiciary, from the nature of its functions, will always be the

least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them.” “There is no liberty, if the power of judging be not separated from the legislative and executive powers.” “Liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments.”

The Supreme Court doesn't always get things right. Dred Scott comes to mind. But our Founders set the Court up as a mechanism to protect the People from tyranny. In 1866, the Supreme Court overturned the capital conviction of Lambdin Milligan on the grounds that trying an American civilian in a military tribunal was unconstitutional. Justice David Davis, with the future in mind, wrote the following in his opinion – “The nation has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution.” In 1935 the Supreme Court held that a Jewish poultry farmer's economic freedom trumped the National Industrial Recovery Act (*Schechter Poultry Corp v the United States*). Franklin Roosevelt was so furious with the decision he concocted a scheme to pack the Supreme Court with justices who would do his bidding. Thankfully, it failed miserably.

Where do we go from here? If the Court overturns the law, is there a possibility that Barack Obama or a future President will use the “exceptions clause” under article 3, section 2 of the Constitution to circumvent the Supreme Court? If the law is upheld, could some future President find a way to ramrod a bill through the legislative branch mandating that all American workers join labor unions or buy a shiny new Chrysler? Could a pro-business Republican, with the consent of Congress, mandate that all Americans, including progressives, purchase trillions in stocks or bonds to prop up failing banks like Goldman Sachs when the next financial crisis inevitably comes? Jim Powell, senior fellow at the CATO Institute, seems to think these notions aren't that far-fetched.

In 1973 Arthur Schlesinger warned of the dangers of an “imperial” presidency and the “expansion and abuse of presidential power.” When asked how it could happen he responded, “Through the mystique of the mandate, through the secrecy system, through executive privilege and impoundment, through political and electronic surveillance in the name of national security.”

I may not like every decision the Supreme Court makes, but I believe they're essential to the maintenance of individual liberty. They're our last line of defense. I pray in this case they decide in favor of the People.