The Washington Post

If Congress had any pride, it would set an immigration policy

George F. Will

November 8, 2019

When an obviously humane and demonstrably popular policy is implemented by a seriously flawed process, the Supreme Court must do its counter-majoritarian duty. It must insist that not even an admirable social end, supported by a national majority, justifies constitutionally dubious means. This describes the drama that will unfold Tuesday when the court hears oral arguments concerning Deferred Action for Childhood Arrivals.

This pertains to the almost 800,000 "dreamers" in our midst, people who were under age 16 when brought to the United States by parents who were not lawfully residents. Congress has long been unable to address the dreamers' status by protecting them from the manifestly unjust threat of deportation from the only country they have known.

Barack Obama's exasperation with the separation of powers, and with the existence of Congress, was even more pronounced than is normal among presidents, especially progressive ones. So he did what he had repeatedly said he lacked the power to do: He made available to these children temporary but renewable legal status and work authorization. He called this an exercise of "prosecutorial discretion." This was somewhat novel in the size of the class of individuals affected and in affirming a right to work and other federal benefits.

When President Trump rescinded DACA, he denounced it as "an end-run around Congress" that was "unconstitutional" and his attorney general said it was "effectuated . . . without proper statutory authority." Never mind the impertinence of this from a president who has declared an "emergency" in order to spend on a border wall money that Congress appropriated for other purposes.

The U.S. Court of Appeals for the 9th Circuit, which is often in error but never in doubt, acknowledged that presidents have considerable power to undo policies put in place by executive actions of prior administrations. But the court held that the administration's reasons for rescinding DACA were arbitrary and capricious and hence violated the Administrative Procedure Act.

A brief from Ilya Shapiro and Josh Blackman (who favor DACA as policy) for the Cato Institute argues that Obama's action went beyond "constitutionally-authorized executive power." Such power is not enlarged "when Congress refuses to act, no matter how unjustified the congressional inaction is." There is no constitutional implication from Congress' passivity in the face of this "foundational transformation of immigration policy," a transformation "inconsistent with the president's duty of faithful execution."

Furthermore, if the Immigration and Nationality Act actually grants to presidents such discretion to rewrite immigration law, then the INA violates the nondelegation doctrine. This forbids Congress to delegate to executive agencies essentially legislative powers regarding "major questions," which surely encompasses immigration policy.

The Constitution's first substantive words — the first after the Preamble — are: "All legislative powers herein granted shall be vested in a Congress." The Constitution's Article I, which deals with Congress, is more than twice as long as Article II, which deals with the president and which devotes more words to how presidents shall be selected and removed than it does to everything else about the presidency. The president's core function is to "take care that the laws be faithfully executed." If Congress had even a faint pulse and an ounce of pride, it would take care to enact laws that set immigration policy rather than churning out faux laws that give to presidents discretion tantamount to lawmaking.

The Trump administration's main reason for rescinding DACA is thoroughly disreputable but entirely permissible — that DACA is bad policy. Another and sufficient reason, however, is that DACA was implemented in accordance with the noxious theory that presidents acquire new constitutional powers by engaging in practices that a lethargic Congress does not challenge. As Cato's brief says, "The executive branch does not need the judiciary's permission to cease enforcing a regulation it determines to be unconstitutional. . . . Courts should allow reversals of novel execution actions that expand presidential power."

If the court allows the administration to withdraw DACA's humane protections for dreamers, this might embarrass Congress into involving itself in the nation's governance. And the Trump administration will have (inadvertently) contributed to circumscribing executive power. "Taming the Prince" (the title of Harvard political philosopher Harvey Mansfield's book on executive power) requires measures "to recage the executive lion" (the words of Saikrishna Bangalore Prakash of the University of Virginia Law School in his upcoming book "The Living Presidency: An Originalist Argument against Its Ever-Expanding Powers"). Tuesday's case demonstrates the difficulty of such taming and recaging until Congress remembers the Constitution's first substantive words.