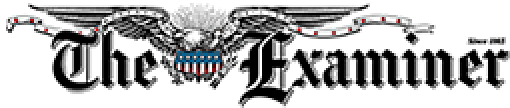

Columnists

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Gene Healy: The Imperial Presidency comes in green, too

By: Gene Healy
Examiner Columnist
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Asked recently when the Senate might vote on cap-and-trade, Senate Majority Leader Harry Reid, D-NV, demurred, muttering about "a busy, busy time the rest of this year." And yet last week, the Obama administration quietly moved forward with a plan to regulate power plants and other large stationary sources of greenhouse gases.

The Obama team appears to believe it has the authority to implement comprehensive climate change regulation, Congress be damned. Worse still, under current constitutional law--which has little to do with the actual Constitution--they're probably right.

In a democratic country, you'd think that before the executive branch could regulate CO2--a ubiquitous substance essential to life--the legislature would have to vote on the issue. But you'd be wrong.

In 2007, the Supreme Court ruled that the 1970 Clean Air Act's definition of air pollutant was broad enough to allow regulation of CO2 emissions from new cars, and that the EPA was required to regulate once it issued a finding that CO2 contributes to global warming. In fact, once the EPA rules that CO2 is a dangerous pollutant--as it did in April--regulation of industrial sources likely becomes mandatory as well.

But existing law still leaves the executive branch enormous discretionary power--and thus a hammer to hold over Congress's head. A report issued in April by the New York University Law School argues that "if Congress fails to act, President Obama has the power under the Clean Air Act to adopt a cap-and-trade system."

James Madison believed that there could be "no liberty where the legislative and executive powers are united in the same person." And yet, here we are, with those powers united in the person of a president who has pledged to heal the planet and stop the oceans' rise.

This constitutional nightmare is the culmination of a trend many years in the making. The first sentence of the Constitution's first article says that "all legislative Powers herein granted" are vested in Congress.

The Supreme Court once took that language seriously, as when, in 1935, it struck down a key New Deal program for delegating legislative power to the executive. Yet the Court eventually made its peace with statutes that allow the executive branch to both make and enforce the law.

That paved the way for the modern administrative state, which looks a lot like the situation complained of in the Declaration of Independence, in which "a multitude of New Offices... harass our people and eat out their substance."

After 9/11, the phrase "unitary executive theory" (UET) came to stand for the idea that the president can do whatever he pleases in the national security arena. But it originally stood for a humbler proposition: UET's architects in the Reagan administration argued that the Constitution's grant of executive power to the president meant that he controlled the executive branch, and could therefore rein in aggressive regulatory agencies.

In an era when Republicans held a virtual lock on the Electoral College, that idea had some appeal. But as Elena Kagan, now President Obama's Solicitor General, pointed out in a 2001 Harvard Law Review article, there's little reason to think that "presidential supervision of administration inherently cuts in a deregulatory direction."

How far will Obama push in the other direction? He may be reluctant to stretch his authority as far as the law will allow, in a political climate where even green-leaning Democrats scream bloody murder every time gas prices rise.

But as Kagan notes, after the Democrats lost control of Congress in 1994, President Clinton used his regulatory authority unilaterally to show progress, pushing "a distinctly activist and pro-regulatory agenda." As Obama's popularity erodes, he may come to like the idea of being the "decider."

Will liberals who decried George W. Bush's unilateralism object to this staggering concentration of executive power? Don't hold your breath.

Examiner columnist Gene Healy is a vice president at the Cato Institute and the author of "The Cult of the Presidency."

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