

LECTURE

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The President's Duty to Faithfully Execute the Law

The Honorable Bob Goodlatte

Abstract: *Article II, Section 3 of the Constitution requires the President to “take Care that the Laws be faithfully executed.” The President must enforce all constitutionally valid Acts of Congress, regardless of the Administration’s view of their wisdom or policy. Without enforcement of the law, there cannot be accountability under law, which is essential to a functioning democracy. When the President fails to perform this duty, the Congress has appropriations and other powers over the President, but none of those powers can be exercised unless both houses of Congress work together. The most powerful means of solving this problem is the electoral process. Congress may also hold the President accountable by asking the courts to call the founts when the lines of constitutional authority have been breached.*

Abraham Lincoln is often paraphrased as saying, “The best way to get a bad law repealed is to enforce it strictly.” While that paraphrase summarizes the gist of what Lincoln was saying, the full text of his remark is worth repeating.

In 1838, early in his career, Abraham Lincoln delivered an address to the Young Men’s Lyceum of Springfield, Illinois. It was entitled “The Perpetuation of Our Political Institutions.” In it, he said:

Let every American, every lover of liberty, every well-wisher to his posterity, swear by the blood of the Revolution, never to violate in the least particular, the laws of the country; and never to tolerate their violation by others. As the patriots of seventy-six did to the support of the Declaration of Independence, so to the support of the Constitution and Laws, let every American pledge

KEY POINTS

- Article II, Section 3 of the Constitution requires the President to “take Care that the Laws be faithfully executed.”
- Without enforcement of the law, there cannot be accountability under law, which is essential to a functioning democracy.
- Presidents must not be allowed to treat the entire United States Code as mere guidelines and pick and choose among its provisions which to enforce and which to ignore
- When the President fails to faithfully execute the laws, the Congress has appropriations and other powers over the President, but both houses of Congress must act together.
- Congress may also hold the President accountable by asking the courts to call the founts when the lines of constitutional authority have been breached.
- The House of Representatives will bring a lawsuit challenging the President’s failure to enforce key provisions of Obamacare.
- This lawsuit seeks to reaffirm constitutional principles, including the President’s duty to faithfully execute the laws.

This paper, in its entirety, can be found at <http://report.heritage.org/hl1254>

The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400 | heritage.org

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his life, his property, and his sacred honor;—let every man remember that to violate the law, is to trample on the blood of his father, and to tear the character of his own, and his children’s liberty. Let reverence for the laws, be breathed by every American mother, to the lisping babe, that prattles on her lap—let it be taught in schools, in seminaries, and in colleges; let it be written in Primers, spelling books, and in Almanacs;—let it be preached from the pulpit, proclaimed in legislative halls, and enforced in courts of justice.

He went on to say:

When I so pressingly urge a strict observance of all the laws, let me not be understood as saying there are no bad laws.... But I do mean to say, that, although bad laws, if they exist, should be repealed as soon as possible, still while they continue in force, for the sake of example, they should be religiously observed.

When Lincoln refers to religiously observing the law “for the sake of example,” he is referring also to the example of the American Republic itself as an example to the world. Without enforcement of the law, there cannot be accountability under law, and political accountability is essential to a functioning democracy.

We in the House of Representatives, who face reelection every two years under the Constitution, are perhaps reminded of that more often than others. And while there is at least one political branch willing to enforce the law, we will not fail to act through whatever means we can successfully avail ourselves of.

The President and the Take Care Clause

Article II, Section 3 of the Constitution requires the President to “take Care that the Laws be faithfully executed.” This clause, known as the Take Care Clause, requires the President to enforce all constitutionally valid Acts of Congress, regardless of his own Administration’s view of their wisdom or policy. The clause imposes a duty on the President; it does not confer a discretionary power. The Take Care Clause is a limit on the Vesting Clause’s grant to the President of “the executive power.”

The United States Court of Appeals for the D.C. Circuit, in an opinion handed down just last year striking down the President’s assertion of authority to disregard a federal statute, provided a succinct description of the President’s obligations under the Take Care Clause, as follows:

Under Article II of the Constitution and relevant Supreme Court precedents, the President must follow statutory mandates so long as there is appropriated money available and the President has no constitutional objection to the statute. So, too, the President must abide by statutory prohibitions unless the President has a constitutional objection to the prohibition. If the President has a constitutional objection to a statutory mandate or prohibition, the President may decline to follow the law unless and until a final Court order dictates otherwise. But the President may not decline to follow a statutory mandate or prohibition simply because of policy objections. Of course, if Congress appropriates no money for a statutorily mandated program, the Executive obviously cannot move forward. But absent a lack of funds or a claim of unconstitutionality that has not been rejected by final Court order, the Executive must abide by statutory mandates and prohibitions.¹

When the President fails to perform his constitutional duty that he take care that the laws be faithfully executed, the Congress has appropriations and other powers over the President, but none of those powers can be exercised unless both houses of Congress work together. Nor would the exercise of those powers solve the problem at hand, because they would not actually require the President to faithfully execute the laws.

Of course, the most powerful and always available means of solving the problem at hand is the electoral process. In the meantime, however, the need to pursue the establishment of clear principles of political accountability is of the essence.

As Lincoln said, “Let reverence for the laws be ... enforced in courts of justice.” It is the courts’ duty, too, to uphold reverence for the law, and it is the specific duty of the courts to call fouls when the lines of con-

1. *In re Aiken County*, 725 F.3d 255, 259 (D.C. Cir. 2013).

stitutional authority under the separation of powers established by the Constitution have been breached.

A lawsuit by the House of Representatives would grant no additional powers to the judicial branch over legislation. Indeed, what a statute says or doesn't say would remain unaffected. But it would be the appropriate task of the federal courts to determine whether or not, whatever a statute says, a President can ignore it under the Constitution. Whatever the result of such a lawsuit, this President and, in all likelihood, future Presidents will continue to nullify Congress's legislative power in the absence of our seeking now the establishment, in court, of a clear principle to the contrary.

Challenging the President's Failure to Faithfully Execute the Laws

The stakes for inaction are high. The lawsuit will challenge the President's failure to enforce key provisions of the law that has come to bear his name in the popular mind and was largely drafted in the White House.

Unlike any other piece of major federal legislation enacted in at least 100 years—including the Federal Reserve Act, the National Labor Relations Act, the Social Security Act, the Civil Rights Act, the Voting Rights Act, the National Environmental Policy Act, the Tax Reform Act, and all other major federal legislation over the last century—the Obamacare law did not garner significant bipartisan support. Indeed, and uniquely, it had none. There was no bipartisan political compromise.

What provisions of Obamacare have been enforced have not proved popular, and what provisions the President has refused to enforce have been delayed until at least after the next federal elections: How convenient for the President, yet how devastating to accountability in our Republic.

Imagine the future if this new, unconstitutional power of the President is left to stand. Presidents today and in the future would be able to treat the entire United States Code as mere guidelines and pick and choose among its provisions which to enforce and which to ignore. The current President has even created entirely new categories of businesses to which his unilaterally imposed exemptions would apply.

In that future, if a bill the President signed into law was later considered to be bad policy and potentially harmful to the President's political party if

enforced, accountability for signing that policy into law could be avoided by simply delaying enforcement until a more politically opportune time, if at all. No longer would presidential candidates running for reelection have to stand on their records, because their records could be edited at will.

If this new, unconstitutional power of the President is left to stand, Presidents would be able to treat the entire United States Code as mere guidelines and pick and choose among its provisions which to enforce and which to ignore.

Sign one bill into law; enforce another version of it in practice. Rinse and repeat—until the accumulation of power in the presidency is complete. Whatever the odds of preventing that nightmarish future through the reaffirming of constitutional principles in court, it would be our duty to pursue it.

Earlier this year, I joined with Representative Trey Gowdy (R-SC) to introduce H.R. 4138, the ENFORCE the Law Act, to put a procedure in place, including expedited court procedures, for Congress to initiate litigation against the executive branch for its failure to faithfully execute the laws. But while that legislation passed the House with bipartisan support, the Senate has failed to consider it. The House then considered and passed a resolution to authorize litigation by the House to restore political accountability and enforce the rule of law.

The Supreme Court and Presidential Power

The Supreme Court has squarely rejected the authority of the President to refuse to enforce constitutional laws. As early as the Court's 1803 decision in *Marbury v. Madison*, the Court recognized Congress's authority to impose specific duties upon executive branch officials by law, as well as the official's corresponding obligation to execute the congressional directive.

The Supreme Court articulated this principle again in an 1838 case, *Kendall v. United States ex rel. Stokes*, involving the President's refusal to comply with an act of Congress, observing that "[t]o contend that the obli-

gations imposed on the President to see the laws faithfully executed, implies a power to forbid their execution; is a novel construction of the constitution, and entirely inadmissible.”² The Court further noted that permitting executive branch noncompliance with the statute “would be vesting in the President a dispensing power, which has no countenance for its support in any part of the constitution; and is asserting a principle, which, if carried out in its results, to all cases falling within it, would be clothing the President with a power to control the legislation of congress, and paralyze the administration of justice.”³

A century later, in what has become the seminal case on executive power, *Youngstown Sheet & Tube Co. v. Sawyer*, the Court reasoned as follows:

In the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the law-making process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.... The Constitution did not subject this lawmaking power of Congress to presidential ... supervision or control.... The Founders of this Nation entrusted the law making power to the Congress alone in both good and bad times.⁴

And as the Court stated just this past term in the case of *Utility Air Regulatory Group v. EPA*, “The power of executing the laws ... does not include a power to revise clear statutory terms that turn out not to work in practice.”⁵

While the constitutional case law regarding standing to bring a case can be murky, one thing is absolutely clear: The Supreme Court has never closed the door to the standing of the House of Representatives as an institution. It has had the opportunity to do so many times in the past, and each time it has refused.

Individual Members of Congress often have difficulty establishing standing to allege an injury, but *Raines v. Byrd*, the leading Supreme Court case on legislator standing, “does not stand for the proposition that Congress can never assert its institutional interests in court,” as it has been described by one federal district court judge.⁶ Indeed, as another federal district court judge recently pointed out, “the Supreme Court’s decision in *Raines* was premised in part on the fact that the legislators in that case did not initiate their lawsuit on behalf of their respective legislative bodies.”⁷

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In fact, the Supreme Court noted in *Raines* itself that it “attach[ed] some importance to the fact that [plaintiffs] have not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose their suits.”⁸ In other words, the Supreme Court’s decision in *Raines* was premised in part on the fact that the Members in that case did not initiate the lawsuit on behalf of their respective house of Congress.

Further, the courts routinely hear lawsuits involving the enforcement of subpoenas approved by federal legislative bodies. They do so because the subpoena power of each house of Congress derives from its legislative powers under Article I of the Constitution, and if Congress is to have the power to legislate, it must have the power to collect the information necessary to inform that legislative power. When the executive branch refuses to give

2. 37 U.S. 524, 525 (1838).

3. *Id.*

4. 343 U.S. 579, 587-89

5. 573 U.S. ___ (2014), slip op. at 23.

6. *Comm. on Oversight & Gov’t Reform v. Holder*, 979 F. Supp. 2d 1, 13 (D.D.C. 2013).

7. *Kucinich v. Obama*, 821 F. Supp. 2d 110, 118 (D.D.C. 2011).

8. 521 U.S. 811, 829.

a congressional body the information it requests, it impedes the legislative power, and the federal courts hear those cases.

But today, the President is not only impeding the legislative power; he is negating it by failing to enforce clear, central provisions of major domestic legislation. And if the federal courts can hear cases in which Congress's legislative power is hampered by the failure to comply with a subpoena, surely they should be able to hear cases in which its legislative power is completely nullified.

Finally, there is nothing unusual or inappropriate about federal courts' weighing in on separation of powers disputes. As the Supreme Court has stated:

Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility.⁹

The Court has also stated that:

Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.¹⁰

The federal courts have a long history of resolving cases involving the allocation of power between the political branches and addressing important separation of powers concerns. Those cases include *Bowsher v. Synar*, regarding the execution of the laws; *INS v. Chadha*, regarding the legislative veto; *Humphrey's Executor v. United States*, *Morrison v. Olson*, and *Myers v. United States*, regarding the removal of appointed officials; and *NLRB v. Noel Canning*, in which the Supreme Court just last term unanimously rejected the President's recess appointments that occurred when the Senate had announced it was in session.¹¹

Conclusion

The House of Representatives—the branch of our federal government closest to the people—has voted many times to repeal Obamacare, which remains as unpopular as ever, but the Senate and the President have ignored Americans' dislike for the law. They have gotten away with ignoring it so far because the obverse of the paraphrase of Lincoln that “the best way to get a bad law repealed is to enforce it strictly” is true as well and aptly summarizes the current danger to democratic government posed by the current Administration: The best way to keep a bad law on the books is to allow its selective enforcement. The House of Representatives will do everything it can to get bad laws off the books.

—*The Honorable Bob Goodlatte represents the Sixth District of Virginia in the United States House of Representatives, where he serves as Chairman of the Judiciary Committee.*

9. Powell v. McCormack, 395 U.S. 486, 549 (1969).

10. Baker v. Carr, 369 U.S. 186, 211 (1962).

11. Bowsher v. Synar, 478 U.S. 714 (1986); INS v. Chada, 462 U.S. 919 (1983); Humphrey's Executor v. United States, 295 U.S. 602 (1935); Morrison v. Olson, 487 U.S. 654 (1988); Myers v. United States, 272 U.S. 52 (1926); NLRB v. Noel Canning, 573 U.S. ____ (2014)