

THE WALL STREET JOURNAL.

This copy is for your personal, non-commercial use only. To order presentation-ready copies for distribution to your colleagues, clients or customers visit <http://www.djreprints.com>.

<http://www.wsj.com/articles/five-ways-to-restore-the-separation-of-powers-1482192048>

OPINION | COMMENTARY

Five Ways to Restore the Separation of Powers

It isn't enough for Trump to quickly rescind Obama's executive orders. Congress also needs to act.



PHOTO: GETTY IMAGES

By **DAVID B. RIVKIN JR.** and
ELIZABETH PRICE FOLEY

Updated Dec. 19, 2016 7:09 p.m. ET

The worst legacy of the Obama administration may be disdain for the Constitution's separation of powers. President Obama's actions have created dangerous stress fractures in our constitutional architecture, making it imperative that the Trump administration and Republican Congress commence immediate repairs.

The Constitution separates power in two ways: among the three branches of the federal government and between the federal government and states. As James Madison wrote in the Federalist Papers, separation creates "a double security" for liberty because "different governments will control each other, at the same time that each will be controlled by itself."

The Obama administration has spurned this core constitutional principle, aggrandizing executive power at the expense of Congress and states. It has rewritten laws, disregarding its constitutional duty to faithfully execute them.

ObamaCare's implementation provides multiple examples: delaying statutory deadlines, extending tax credits to groups Congress never included, exempting unions from fees, expanding hardship waivers beyond recognition and granting "transition relief" for preferred employers.

Mr. Obama even usurped Congress's power of the purse, spending billions for "cost-sharing subsidies" that pay ObamaCare insurers for subsidizing deductibles and copays. Congress never appropriated money for these subsidies, so the administration shifted money appropriated for other purposes. The House sued to defend its constitutional prerogative, and in May a federal court ruled against the administration, which has appealed.

Mr. Obama also exempted five million illegal immigrants from deportation, though Congress had unambiguously declared them deportable. He waived the mandatory work requirement of the 1996 welfare reform. He redefined sexual discrimination under Title IX, forcing schools to allow transgender students to use bathrooms of their non-biological gender, and threatening to withdraw funds if colleges refuse to reduce due process protections for individuals accused of sexual assault.

The president has exhibited particular antipathy toward the Senate's advice-and-consent duty. In *Noel Canning v. NLRB* (2014), the Supreme Court unanimously ruled that the administration violated separation of powers by making unilateral appointments to the National Labor Relations Board while the Senate was in session. And the president unilaterally committed the nation to an unpopular nuclear deal with Iran, bypassing the Senate's treaty ratification power.

Mr. Obama's actions have also shattered federalism. The administration rewrote the 1970 Clean Air Act, commanding states to revamp their electricity generation and distribution infrastructure. It rewrote the 1972 Clean Water Act, claiming vast new power to regulate ditches and streams under the risible notion that they are "navigable waters." It has refused to enforce existing federal drug laws, emboldening states to legalize marijuana.

The media and academy enabled the administration's unconstitutional behavior because they support its policy agenda. But the Framers expected members of Congress to jealously defend congressional power against executive encroachment—even from a president of the same political party. As Madison observed, "Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place."

This principle disappeared during the past eight years. In his 2014

State of the Union address, the president vowed to implement his agenda “wherever and whenever I can” without congressional involvement—to thunderous applause by Democrats. In November 2014, Democratic Senators urged the president to vastly expand his unilateral amnesty for illegal immigrants.

The Trump administration and GOP Congress should resist the temptation to follow this Constitution-be-damned playbook. The greatest gift Republicans could give Americans is a restored separation of powers. But this cannot be accomplished by merely rescinding the Obama administration’s unconstitutional executive orders. While this is a necessary step, Congress should enact additional reforms.

First, Congress can amend the 1996 Congressional Review Act to require affirmative approval of major executive-branch regulations. The law now allows regulations to go into effect automatically if Congress does not disapprove them. The act has been used only once to overturn a regulation because it requires passage of a joint resolution of disapproval—which must be signed by the president. This requirement should be inverted: If Congress does not affirmatively approve a regulation, it never goes into effect.

Second, Congress could prohibit “Chevron deference,” in which federal courts defer to executive branch interpretations of ambiguous statutes. Chevron deference is a judge-made doctrine that has aggrandized executive power, ostensibly to implement Congress’s intent. If Congress denounces such deference, it can simultaneously reduce executive power and encourage itself to legislate with greater specificity.

Third, Congress can augment its institutional authority by expanding its contempt power. The criminal contempt statute should require the U.S. attorney to convene a grand jury upon referral by the House or Senate without exercising prosecutorial discretion. Congress should also extend the civil contempt statute to the House, not merely the Senate, and enact a new law specifying a process for using Congress’s longstanding (but rarely invoked) inherent contempt authority.

Fourth, Congress can require that all major international commitments be ratified by treaty. A statute defining the proper dividing line between treaties and executive agreements would reassert the Senate’s constitutional role, provide clarification to the judiciary, and encourage communication and negotiation between Congress and the president.

Fifth, Congress can enact a law further restricting its ability to coerce states into adopting federal policies or commanding state officials to carry them out. While the courts have ultimate say on the contours of

these federalism doctrines, a law could force greater consensus and debate, provide guidelines on Congress's use of its powers, and signal to the judiciary a reinvigorated commitment to federalism.

Restoring separation of powers is necessary and possible. It should be the highest priority of the Trump administration and Congress.

Mr. Rivkin and Ms. Foley practice appellate and constitutional law in Washington, D.C. Ms. Foley is also a professor of constitutional law at Florida International University College of Law.

Copyright 2014 Dow Jones & Company, Inc. All Rights Reserved

This copy is for your personal, non-commercial use only. Distribution and use of this material are governed by our Subscriber Agreement and by copyright law. For non-personal use or to order multiple copies, please contact Dow Jones Reprints at 1-800-843-0008 or visit www.djreprints.com.