THE WALL STREET JOURNAL.

Opinion

Michael McConnell: Obama Suspends the Law

Like King James II, the president decides not to enforce laws he doesn't like. That's an abuse of power.

By
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July 8, 2013 7:28 p.m. ET

President Obama's decision last week to suspend the employer mandate of the Affordable Care Act may be welcome relief to businesses affected by this provision, but it raises grave concerns about his understanding of the role of the executive in our system of government.

Article II, Section 3, of the Constitution states that the president "shall take Care that the Laws be faithfully executed." This is a duty, not a discretionary power. While the president does have substantial discretion about *how* to enforce a law, he has no discretion about *whether* to do so.

This matter—the limits of executive power—has deep historical roots. During the period of royal absolutism, English monarchs asserted a right to dispense with parliamentary statutes they disliked. King James II's use of the prerogative was a key grievance that lead to the Glorious Revolution of 1688. The very first provision of the English Bill of Rights of 1689—the most important precursor to the U.S. Constitution—declared that "the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of parliament, is illegal."

To make sure that American presidents could not resurrect a similar prerogative, the Framers of the Constitution made the faithful enforcement of the law a constitutional duty.

The Justice Department's Office of Legal Counsel, which advises the president on legal and constitutional issues, has repeatedly opined that the president may decline to enforce laws he believes are unconstitutional. But these opinions have always insisted that the president has no authority, as one such memo put it in 1990, to "refuse to enforce a statute he opposes for policy reasons."

Attorneys general under Presidents Carter, Reagan, both Bushes and Clinton all agreed on this point. With the exception of Richard Nixon, whose refusals to spend money appropriated by Congress were struck down by the courts, no prior president has claimed the power to negate a law that is concededly constitutional.

In 1998, the Supreme Court struck down a congressional grant of line-item veto authority to the president to cancel spending items in appropriations. The reason? The only constitutional power the president has to suspend or repeal statutes is to veto a bill or propose new legislation. Writing for the court in *Clinton v. City of New York*, Justice John Paul Stevens noted: "There is no provision in the Constitution that authorizes the president to enact, to amend, or to repeal statutes."

The employer mandate in the Affordable Care Act contains no provision allowing the president to suspend, delay or repeal it. Section 1513(d) states in no uncertain terms that "The amendments made by this section shall apply to months beginning after December 31, 2013." Imagine the outcry if Mitt Romney had been elected president and simply refused to enforce the whole of ObamaCare.

This is not the first time Mr. Obama has suspended the operation of statutes by executive decree, but it is the most barefaced. In June of last year, for example, the administration stopped initiating deportation proceedings against some 800,000 illegal immigrants who came to the U.S. before age 16, lived here at least five years, and met a variety of other criteria. This was after Congress refused to enact the Dream Act, which would have allowed these individuals to stay in accordance with these conditions. Earlier in 2012, the president effectively replaced congressional requirements governing state compliance under the No Child Left Behind Act with new ones crafted by his administration.

The president defended his suspension of the immigration laws as an exercise of prosecutorial discretion. He defended his amending of No Child Left Behind as an exercise of authority in the statute to waive certain requirements. The administration has yet to offer a legal justification for last week's suspension of the employer mandate.

Republican opponents of ObamaCare might say that the suspension of the employer mandate is such good policy that there's no need to worry about constitutionality. But if the president can dispense with laws, and parts of laws, when he disagrees with them, the implications for constitutional government are dire.

Democrats too may acquiesce in Mr. Obama's action, as they have his other aggressive assertions of executive power. Yet what will they say when a Republican president decides that the tax rate on capital gains is a drag on economic growth and instructs the IRS not to enforce it?

And what of immigration reform? Why bother debating the details of a compromise if future presidents will feel free to disregard those parts of the statute that they don't like?

The courts cannot be counted on to intervene in cases like this. As the Supreme Court recently held in *Hollingsworth v. Perry*, the same-sex marriage case involving California's Proposition 8, private citizens do not have standing in court to challenge the executive's refusal to enforce laws, unless they have a personal stake in the matter. If a president declines to enforce tax laws, immigration laws, or restrictions on spending—to name a few plausible examples—it is very likely that no one will have standing to sue.

Of all the stretches of executive power Americans have seen in the past few years, the president's unilateral suspension of statutes may have the most disturbing long-term effects. As the Supreme Court said long ago (*Kendall v. United States*, 1838), allowing the president to refuse to enforce statutes passed by Congress "would be clothing the president with a power to control the legislation of congress, and paralyze the administration of justice."

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