



Written by [Selwyn Duke](#) on August 11, 2021

## The Problem Isn't That Biden is Defying the SCOTUS — It's That He's Defying the Constitution

When courts blocked President Trump's travel bans, his reinstatement of the military's "transgender" ban, and his effort to end DACA, I pointed out that he could actually just ignore the judges' overreach because "judicial supremacy" has no basis in law. I also mentioned, long ago, that ignoring court rulings is precisely what the Left would do, anyway, once it had enough power. It wasn't going to let some black-robed lawyer, with no ability to enforce his will, thwart its agenda.



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And sure enough, it has come to pass.

As Chris Talgo, senior editor at The Heartland Institute, [writes](#), "On June 29, the U.S. Supreme Court declared the Centers for Disease Control and Prevention (CDC)'s eviction moratorium, which was implemented during the height of the COVID-19 pandemic,... unconstitutional."

"Specifically," Talgo continues, "U.S. Supreme Court Justice [Brett Kavanaugh wrote](#), 'I agree with the District Court and the applicants that the Centers for Disease Control and Prevention exceeded its existing statutory authority by issuing a nationwide eviction moratorium.'"

"Kavanaugh added, 'In my view, clear and specific congressional authorization (via new legislation) would be necessary for the CDC to extend the moratorium past July 31.'"

Despite this, the Biden administration's CDC has extended the moratorium, thumbing its nose at the law. It did this, mind you, while acknowledging its action's unconstitutionality. In fact, here "was [Biden's initial response](#) after the Supreme Court's recent ruling," relates Talgo:

"I've sought out constitutional scholars to determine what is the best possibility that would come from executive action, or the CDC's judgment, what could they do that was most likely to pass muster, constitutionally. The bulk of the constitutional scholarship says that it's not likely to pass constitutional muster."

Talgo rightly calls it "disconcerting" (to say the least) that the administration is effecting a policy it apparently knows is unconstitutional, in violation of Biden's oath of office. But he also writes that equally troubling is that Biden took his action despite not having "the power to overrule a co-equal branch of government." Yet did he really thus overrule?

Or is it that he wouldn't allow the judiciary to overrule him?

In other words, here's what should be asked: If there's really something wrong with overruling "a co-equal branch of government," how is it that the judiciary should be able to overrule the co-equal executive branch, as it has been doing for 200 years?

If you say the Constitution grants this power, think again. While the document gives the legislative and



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executive branches the powers to, respectively, make law and enforce law, nowhere does it grant the courts “judicial supremacy.”

So how, then, did the judiciary get the “power” to rule on law and have its decisions constrain not just its own branch, but the other two also? Well, this “power” was declared by the courts themselves, most notably in the 1803 *Marbury v. Madison* decision.

That’s right, the Supreme Court gave the Supreme Court the supreme power to have the final say on laws’ meaning.

It’s a great con if you can pull it off.

And, predictably, the Democrats — who, for all their faults, have no trouble operating outside the box — are ignoring the “tradition” of the courts’ extra-constitutional power.

Some may be upset right now, thinking I’m taking the administration’s side; I’m not. I’m taking the Constitution’s side. Conservatives may now be angry because they abided by unfavorable court ruling after unfavorable court ruling decade after decade (e.g., [Obergefell v. Hodges](#) and the aforementioned opinions against Trump), but they should be angry at themselves. If they’d been Constitution-oriented all along instead of ignoring the document in deference to a court-conjured standard (i.e., judicial supremacy), our cause and country would currently be in far better shape.

Moreover, the matter of judicial supremacy is now academic because the Biden administration has provided an object lesson in the SCOTUS’s “impotence,” a lesson the late Justice Antonin Scalia [warned](#) in 2015 the Court *would* eventually get. So we can continue saying “The courts ruled this; the courts ruled that” and stamping our feet, but to what end if the Left will just ignore the judges? Yet we do have recourse.

Note that the administration is effecting its policy objectives, despite the constitutional SCOTUS ruling, because it has the power to do so. Note something else, too:

Only *power* negates power.

Federally, the proper remedy for a rogue administration is impeachment. Of course, Republicans don’t have the will and numbers in Congress to effect such an action. But they do control many *states*. And the states should simply ignore — or *nullify* — the CDC moratorium and declare it null and void within their jurisdictions. (They should have similarly ignored the *Obergefell* marriage opinion.)

Note here that Thomas Jefferson called nullification the “rightful remedy” for all federal usurpation of states’ powers.

Then there’s yet another remedy in the CDC case. Talgo asks, “If the Executive Branch can arbitrarily defy Supreme Court rulings, what is the point of the Supreme Court?” The answer is that the courts are meant to have the power to adjudicate individual cases and have their rulings be binding on those *party to the cases*.

In other words, the administration can unconstitutionally try to take landlords to task for violating the CDC order. And judges — abiding by the relevant SCOTUS ruling — can continue acquitting them if and when they come before the bench. This is called balance of power, the proper kind of tug of war between the executive and judicial branches.

One more thing: When I discussed this matter years ago with ex-ambassador and government affairs expert Alan Keyes, Ph.D., he agreed with the above assessment of the judiciary’s role and said that the



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courts are meant to act as an “alarm bell.” That is to say, witnessing the above inter-branch battle, the people need to take note of the SCOTUS’s correct ruling and the administration’s illegality. They then must vote in a Congress in 2022 that will take remedial action and, if the Biden-Harris administration is still in place two years hence, oust it from power in 2024.

And what if the people lack the character and wisdom to nullify federal tyranny and hold their leaders accountable? Then, as Samuel Adams might say, may our chains set lightly upon us. No matter what, we won’t have a government that’s better than we ourselves are.



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