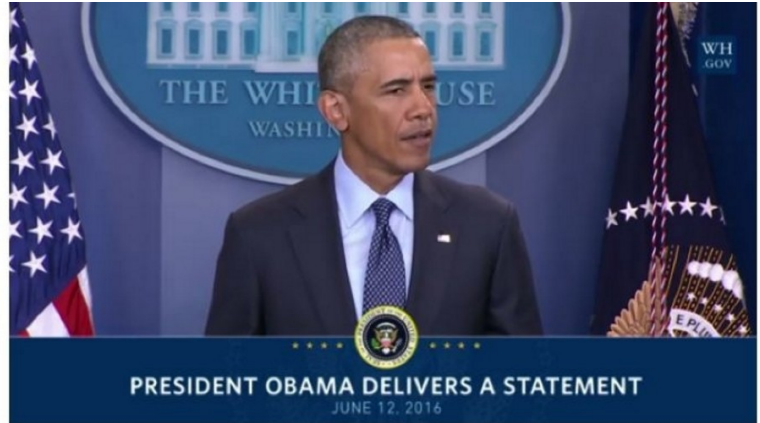




Has the President Usurped the Constitutional Authority of Congress?

On June 16, a Minnesota Public Radio news program held a debate on this timely question: Has the president usurped the power of Congress?

With the presidential election fewer than five months from now and in light of promises made by both major party candidates about what they will do in their “first 100 days,” it is important to review the powers granted to that office by the states when they created the federal government in the Constitution.



Before beginning to offer a brief, constitutionally based answer to that question, Americans concerned about the rise of the “imperial president” may study the words and warnings of our Founding Fathers and their political and philosophical influences regarding the primacy of the separation of powers in a good government.

James Madison, writing as “Publius,” stated in *The Federalist*, No. 47: “The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.”

Madison himself was restating in his inimitable style, one facet of federalism that was universally considered to be an essential pillar of liberty.

As the venerable French philosopher Baron de Montesquieu wrote in his influential treatise *The Spirit of the Laws*, “When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.”

“Centinel,” an anti-Federalist writer, opposed to ratifying the new Constitution, rephrased for his readers what was already, in the 18th century, a well-settled aspect of good government, “This mixture of the legislative and executive moreover highly tends to corruption. The chief improvement in government, in modern times, has been the complete separation of the great distinctions of power; placing the legislative in different hands from those which hold the executive.”

Another anonymous anti-Federalist commented, “Liberty therefore can only subsist, where the powers of government are properly divided, and where the different jurisdictions are inviolably kept distinct and separate.”

That said, it is little to be disputed that presidents for decades have exercised lawmaking power, all of which was granted in the Constitution only to the Congress. Presidents have pushed the boundaries of their powers beyond the pale of consent of the governed and have consolidated some level of control over every aspect of human life. That this propensity existed and that it could, if realized, become the



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catalyst for autocracy was recognized by the men of the Founding Generation, who warned of the dangers to liberty posed by a power-hungry president. Here are just a few examples of their timely and timeless words.

During the debates on ratification of the Constitution, several opponents of that document warned of the danger lurking in a lawmaking president.

Governor George Clinton of New York wrote an extremely prescient warning regarding the danger latent in the office of the presidency as defined by the Constitution:

He will be surrounded by expectants and courtiers, his power of nomination and influence on all appointments, the strong posts in each state comprised within his superintendence and garrisoned by troops under his direction, his control over the army, militia, and navy, the unrestrained power of granting pardons for treason which may be used to screen from punishment those whom he had secretly instigated to commit the crime and thereby prevent discovery of his own quiet, his duration in office for four years; these and various other principles evidently prove the truth of the position that if the president is possessed of ambition, he has power and time sufficient to ruin his country.

And:

Experience ought to teach you that when a man is at the head of an elective government, invested with great powers and interested in his re-election, in what circle appointments will be made, by which means an imperfect aristocracy bordering on monarchy may be established.

Ben Franklin, a friend of the Constitution, made a similar observation. "The executive will always be increasing here, as elsewhere, till it ends in monarchy," Franklin warned.

No president may constitutionally set any agenda outside the very narrow range of constitutional powers, without — as Algernon Sidney, Emer de Vattel, Samuel Pufendorf, John Locke, and others teach — acting without the consent of the governed and thus rendering each of these actions null, void, and of no legal effect.

Likewise, Congress may not permit the president to act outside the constitutional sphere of his authority. Here, too, there is treachery, in that congressmen have meekly capitulated to presidential power grabs rather than risk not being reelected. This is no less a constitutional crime than the president's assumption of the legislative prerogative.

If the president were to sign a bill into law that is not made in pursuance of the powers granted to Congress by the Constitution, then he violates his oath.

Hamilton plainly made this point in *The Federalist*, No. 33:

But it will not follow from this doctrine [that laws passed by Congress are the Supreme law of the land] that acts of the large society which are NOT PURSUANT to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land. These will be merely acts of usurpation, and will deserve to be treated as such." [Emphasis in original.]

As I wrote above, the entirety of presidential power is defined in the Constitution. The Constitution represents the supreme law of the land, and all federal offices created therein are given specific and limited powers. If a president (or any other man holding elective office under the Constitution) ventures beyond those restrictive boundaries, he acts outside the law and those actions are absolutely without the force of law, and people are obligated to disregard them.



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Perhaps this point is made most clearly in Book I, Chapter 3 of Emer de Vattel's *Law of Nations*, a book that profoundly impacted every leading light of the Founding Generation from Sam Adams to James Wilson. Here is de Vattel's statement on the subject of a ruler acting outside the limits of his constitutionally defined powers:

The constitution and laws of a state are the basis of the public tranquillity, the firmest support of political authority, and a security for the liberty of the citizens. But this constitution is a vain phantom, and the best laws are useless, if they be not religiously observed: the nation ought then to watch very attentively, in order to render them equally respected by those who govern, and by the people destined to obey. To attack the constitution of the state, and to violate its laws, is a capital crime against society; and if those guilty of it are invested with authority, they add to this crime a perfidious abuse of the power with which they are entrusted. The nation ought constantly to repress them with its utmost vigor and vigilance, as the importance of the case requires.

Today, we have become accustomed to the president routinely signing unconstitutional usurpations of power into law; lately these fiats framed as laws have taken an alarming turn, one aimed at disarming the civilian populace.

So, back to MPR's debate prompt: Has the president usurped the powers of Congress?

Without question.

Any action by the president — executive order, signing statement, proclamation, etc. — that is enforced on the people as if it were law, is no law at all. Any attempt by the president or any executive branch agency to enforce that law is the act of a tyrant.



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