The Washington Times

Friday, February 21, 2014

GOESSLING: The power of the president's pen versus the Constitution

The Supreme Court must rein in Team Obama's power grab

When President Obama announced to the world that "I have a pen and a phone," he articulated what those of us who go to court to challenge his administration's constitutional overreaches, and a growing number of other Americans, have come to fear: The law is what he and his regulators decide it will be.

Promising in 2008 to "fundamentally change" America, Mr. Obama's executive agencies — including the Internal Revenue Service, Environmental Protection Agency, Food and Drug Administration and others — have pursued the most aggressive and unprecedented seizure of regulatory and executive authority in American history.

In case after case and issue after issue, a pattern has developed that shreds constitutional separation of powers in favor of executive authority to enact laws without congressional approval and to deny the power of the courts to review.

Is this an overstatement of the constitutional crisis? Let the Obama administration track record speak for itself.

While the six parties representing states, companies, professional and trade associations, and 12 members of Congress prepare for oral arguments before the U.S. Supreme Court on Feb. 24 challenging the EPA's so-called "climate change" regulations, we have come face to face with the agency's method of operation under the current administration.

The trillion-dollar, command-and-control regulations were railroaded through a questionable "public comment" period and enacted under claimed authority of the Clean Air Act so quickly that states could not enforce them.

This resulted in the EPA admission that the regulations would lead to "absurd results." In court, EPA lawyers have argued that the regulatory power is entitled to "extreme deference" from the federal judiciary. Congress has not reviewed and approved these substantive changes to the Clean Air Act.

Last year, the Supreme Court unanimously agreed that the IRS overstepped its discretionary authority by rejecting tax-credit claims sought by a company for taxes it paid in a foreign country, so-called "double taxation."

The high court thankfully held that the purpose of the existing law — and decades of legal precedent and administrative decisions — was to "mitigate the evil of double taxation," which the IRS had ignored and deliberately ruled in the opposite direction.

In a recent case involving a new FDA regulation, government lawyers argued in court that the federal judiciary has no jurisdiction to review the agency's regulatory decisions, eliciting a response from a federal judge who asked, "And I wonder if I am being asked to be a potted plant?"

In December, the EPA rendered a twisted and unprecedented reading of the Clean Air Act to arrive at the decision to order that the city of Riverton, Wyo., and all of its residents and private property will become part of an Indian reservation nearby.

Obamacare, a law passed by Congress and signed by the president, has been unilaterally and substantively changed 18 times by the Obama administration without congressional review and approval, according to a Galen Institute study.

Lest we assume the administration did not think it needed congressional approval to change the law, Mr. Obama has also signed 15 additional amendments to the law that were passed by Congress.

In dozens of cases and in hundreds of executive decisions by the Obama administration, the regulatory and administrative dogs have been let loose to explore how far they can go without being pulled back on the constitutional leash. With the power of the pen, through executive orders, Mr. Obama has promised a raft of new laws.

Future presidential administrations, Democratic and Republican alike, will take note of the current administration's precedent-setting forays beyond the contours of our Constitution.

In several important instances, the Supreme Court has pulled back on the leash, exercising its necessary power under Article III of the Constitution. Even a divided Congress can find common ground to deny unfettered executive authority now.

This is what the Framers intended as effective separation of powers in order to stop the concentration of authority in the hands of a president.

Shannon L. Goessling is executive director and chief legal counsel for Southeastern Legal Foundation.