

COMMENTARY

President Obama's Top Ten Constitutional Violations of 2015

By Ilya Shapiro

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As we approach the final year of Barack Obama's presidency, there isn't much that the president can do to change people's opinion of him, for better or worse. His legacy, barring some extraordinary occurrence — including an extraterrestrial one, as the holiday advertising blitz for the new *Independence Day* movie reminds us — is baked into history.

Setting aside legislation and executive action (on which more imminently), we note that one of President Obama's chief accomplishments has been to return the Constitution to a central place in our public discourse.

Unfortunately, the president fomented this upswing in civic interest not by talking up federalism or the separation of powers but by blatantly violating the strictures of our founding document. With his pen and his phone, and hearkening to Woodrow Wilson's progressive view of government, he's been taking out his frustrations with the checks and balances that inhibit his ability to "fundamentally transform" the country.

But a lack of congressional acquiescence hasn't stopped this president. Even in his first term, the administration launched a "We Can't Wait" initiative, with senior aide Dan Pfeiffer explaining that "when Congress won't act, this president will." And when the reelected President Obama announced his second-term economic plans, he explained that "I will not allow gridlock, or inaction, or willful indifference to get in our way."

Accordingly, it hasn't been difficult to point to constitutional abuses; the hard part is narrowing them down to a top-ten list. I did so in [2011](#) and [2013](#) (and [once for Eric Holder](#) when he resigned as attorney general), and now it's time to do so again. Obamacare alone is a never-ending bonanza of lawlessness, so I'm limiting myself to five

entries there.

In any case, herewith is my best stab at the list of President Obama's top ten constitutional violations of the year (including actions taken in 2014 whose effects continued into 2015):

1. Obamacare's Bay State bailout and Commonwealth kickback. To bail out Massachusetts's malfunctioning health-care exchange, President Obama and Governor Deval Patrick (before he left office) arranged for more than 300,000 state residents to receive temporary Medicaid coverage without any verification of eligibility, and for the state to get the most generous taxpayer-funded premium subsidies in the entire country.

2. Further delays of Obamacare's employer mandate. On February 10, 2014, the administration announced that it would again be delaying the employer mandate. This particular delay gives mid-sized employers (those with 50 to 100 full-time employees, a category that doesn't exist in the text of the law) until 2016 to provide coverage and relaxed some of the requirements for larger employers.

3. Extending Obamacare subsidies to non-exchange plans. The administration found in February 2014 that some exchanges were having difficulty determining people's eligibility. And so now, owing to this "exceptional circumstance," exchanges can grant retroactive coverage based on the application date rather than on the date of acceptance. Also, those enrolled in plans *outside* the exchanges who were then determined to be eligible for coverage could receive the subsidies granted to those in an exchange plan.

4. Delay of Obamacare's transparency requirements. In October 2014, the administration announced that it would not be enforcing the Obamacare's "transparency in coverage" provisions, which require insurers to disclose data on enrollment, denied claims, and the costs to consumers for certain services.

5. Obamacare's hidden tax on states. The Affordable Care Act imposed a health-insurance providers' fee on insurance companies, for the purpose of taxing the wind-fall they were expected to receive from increased enrollment. In March 2015, states were notified that they too would be assessed this fee, because they use managed-care organizations to provide Medicaid services. Nothing in the ACA allows the federal gov-

ernment to force states to pay the fee, so the administration left it to the “private” Actuarial Standards Board to determine what makes a state’s payments to managed-care organizations “actuarially sound,” as required by law. The board then interpreted that “actuarially sound” standard to require states to pay the taxes assessed on their managed-care organizations. For Texas, that means an unanticipated annual budget hit of \$120 million. This assessment raises serious coercion issues, as the states have no choice but to pay the tax or lose their federal Medicaid funds. Texas, joined by Kansas and Louisiana, sued the government in October.

6. Deferred Action for Parents of Americans. Speaking of Texas suing the government: After President Obama decided in November 2014 that he had been wrong 22 times in saying he couldn’t give temporary legal status to illegal immigrants, a majority of the states took him to court. The administration engineered DAPA in the wake of Congress’s rejection of the very policies the program sets forth, in violation of the Administrative Procedure Act, immigration law, and the Constitution’s take-care clause. A district court temporarily enjoined DAPA in February 2015, which action the Fifth Circuit twice affirmed. Stay tuned for the Supreme Court’s resolution this coming June.

7. EPA’s Clean Power Plan. In June 2014, the Environmental Protection Agency proposed a new rule for regulating power-plant emissions. Despite significant criticism, on August 3, 2015, it announced a final rule. It gives states until 2018 — it “encourages” September 2016 — to develop final plans to reduce carbon dioxide emissions, with mandatory compliance beginning in 2022. EPA cites Section 111 of the Clean Air Act as justification for the Clean Power Plan, but that section can’t give the agency such authority. Section 111(d) doesn’t permit the government to require states to regulate pollutants from existing sources when those pollutants are already being regulated under Section 112, as those deriving from coal-fired plants are.

8. EPA’s Clean Water Rule. On May 27, 2015, EPA announced its new Clean Water Rule, which aims to protect streams and wetlands from pollution. The agency insists that the rule doesn’t affect bodies of water not previously regulated, but several groups have sued on the basis that the rule’s definitions of regulated waters greatly exceed the EPA’s authority under the Clean Water Act to regulate “waters of the United States.” The Supreme Court has thrice addressed the meaning of that phrase, making clear that, for the EPA to have regulatory authority, a sufficient nexus must exist be-

tween the location regulated and “navigable waters.” The Clean Water Rule, however, purports to give EPA power far beyond waters that are “navigable” by any stretch of the definition of that word.

9. EPA’s cap-and-trade. On October 23, 2015, EPA issued a carbon-emissions cap-and-trade regulation, establishing for each state limits on carbon dioxide emission, with four interim steps on the way to the final goal. The focus is on cap-and-trade as the means to meet the limits. EPA says that this rule, too, is authorized by Section 111 of the Clean Air Act, but Congress considered and rejected such a cap-and-trade program in 2009. Far from being authorized by the Clean Air Act or from lying in some zone of statutory ambiguity, this new regulation contradicts the express will of Congress.

10. Net neutrality. In the works throughout the Obama presidency, the Open Internet Rule was adopted in February and went into effect on June 12, 2015. Although the Federal Communications Commission touts the regulation as a means to ensure that the Internet remains free of censorship, the rule impinges on the First Amendment rights of Internet-service providers, which are forbidden to prioritize any Internet traffic.

As I said, it was hard to narrow the list to ten examples of lawlessness. Among the other candidates for inclusion are the failure to prosecute the IRS scandal; the infringement, by the Federal Energy Regulatory Commission, on the exclusive authority of states to regulate the retail energy market (this measure is awaiting the Supreme Court’s ruling); the White House’s exemption of its Office of Administration from the Freedom of Information Act; the expansion of loan guarantees for clean-energy development; and, of course, other changes to Obamacare.

A major item that’s technically not a constitutional violation: The National Labor Relations Board has taken several steps, culminating in the Browning-Ferris ruling, to redefine “joint employer” such that franchisors can be held responsible for the labor-law violations of franchisees. That term “joint employer” does not appear in the National Labor Relations Act, and the board’s new rule goes beyond standard agency law to impose liability on companies with “indirect control” over their subsidiaries. This redefinition could destroy the franchise model as well as hasten the automation trend at service outlets.

And note that I've kept this discussion entirely to domestic affairs, in part because the scope of executive power over foreign affairs is less clearly defined. Otherwise, one could debate certain military engagements, the Iran nuclear (non-)treaty, and the swap for Bowe Bergdahl — not to mention whatever executive actions come out of the Paris climate talks.

In sum, as the nation limps into Barack Obama's lame-duck year, Americans have much to ponder regarding the example this president has set for his successor — and what powers that successor will abuse. Hillary Clinton has already pledged to take executive action on gun control, campaign finance, immigration (because apparently President Obama is too timid here), corporate inversions, and who knows what else. And imagine what Donald Trump would do — or don't, lest it spoil your holiday.

Happy New Year!



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