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Sometimes it Matters:

President Obama and The Separation of Powers.

From time to time esoteric principles of constitutional law stir the curiosity of legal scholars and show up in the mundane world of political debate. Often these issues fail to attract much attention in the media, because they are hard to explain, and do not seem to have immediate impact on our lives.

Sometimes, however, it matters.

In recent comments, President Obama attacked the principle that the courts have the authority to rule on the constitutionality of legislative actions. He recently asserted that if the Supreme Court were to overturn key provisions of Obamacare that it would be an "overreach" by an "unelected" court.

This comment was a direct attack on core principles of the US form and structure of government that includes, at its base, checks and balances that include a separation of powers.

James Madison set forth the reasoning behind the US Constitution in the Federalist Papers, where he identified the separation of powers as a cornerstone of the slate of protections that the people have against the power of factions within a government:

"It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it. After discriminating therefore in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary; the next and most difficult task, is to provide practical security for each against the invasion of the others. What this security ought to be, is the great problem to be solved" James Madison, Federalist, no. 48, 332-38.

And it was solved with extraordinary elegance. Federal judges are appointed for life, and are approved by the Senate. The Executive Branch is elected for four years. The House of Representatives is elected for two years and the Senate every six. The Congress controls the purse while the Executive controls the bullets that the money can buy.

No other form of government has the stability that the US enjoys because of the inability for one group to exercise power without a generation of majority control of by the Executive and Legislative branches. And even then, the constitution tries to appeal to a higher authority.

In some ways, this all works because within the American psyche we believe in the integrity of these checks and balances, and the social peace we enjoy is in some way attributable to the fact that neither a minority NOR A MAJORITY can exercise dominion over the other without a generation passing.

Obama is arguing that majority rule should dictate policy. He argues, in effect, that a dictatorship by the majority is legitimate because of its simple moral logic. In fact, the entire construct of the US Constitution was not intended to protect the majority from the minority but rather to protect the *minority* from the *majority*: "a common passion or interest will be felt by a majority, and there is nothing to check the inducements to sacrifice the weaker party. Hence democracies have ever been found incompatible with personal security or the rights of property; and have, in general, been as short in their lives as they have been violent in their deaths." *Federalist x p. 60 the Dawson Edition.*

Why does this matter?

The political turmoil that threatens Europe as an ugly complement to economic distress is made worse by the sharp political swings that can occur across all branches of parliamentary forms of government with a single election. Tax policy, security policy, the approach to property rights can change with the wind, and therefore, there is greater value to the oppressive actions of the MAJORITY in the short term, because the payoff is big, and fast.

The US has been insulated from the double punch of economic and social unrest because of the belief in the stability of the system and the absence of fear by the minority that there is a real threat of a radical shift that could result in rapid disenfranchisement.

If this were to change, the political debate in the US would change and the method by which that debate is exercised would become more violent.

One could argue that Obama is really pushing for a populist rule, because he perceives that it serves his constituency. Fortunately for his constituency, during the civil rights movement populist rule was checked by the same constitution he sees as inconvenient. But Europe should take note, because Europe is well served to have the US as a stable partner whose path, more like the tortoise than the hare, may serve as a financial and geopolitical anchor during a coming decade of great uncertainty.

In the coming weeks then United States Supreme Court will rule on the constitutionality of certain elements of Obamacare. We all need to watch the reaction by the Obama Administration if the ruling is against them. As recently as April, the Fifth Circuit Court of Appeals required that the Administration specifically address the authority of Federal courts because of the unprecedented public challenges that have occurred.

Europe should take note, because the rise of unchecked Executive Power will make the US less reliable over the long term both in terms of policy and in terms of economic strength. Radical swings in policy to serve the mood of the moment are the consequence of unmanaged democracy. This potential volatility is the enemy of investment and long term financial progress. In fact, we see this in the US already.

If there is any doubt about the intentions of the current Executive, it should be observed that Obama is a constitutional scholar. Despite understanding the Constitution, and despite having sworn to uphold it, he has decided to challenge one of its core principles. He knows better and has chosen political expediency.

Europe should celebrate our slow moving ways and be aware of the dialogue that is occurring between the Administration and the US Constitution.

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