

Commentary: Balancing power – lawyers, guns and money

BY TRISTAN L. DUNCAN

A momentous national debate is afoot concerning the U.S. Supreme Court's proper role in deciding the constitutionality of an act of Congress; in this case, the Affordable Care Act.

Pro-act advocates, like those in the White House, argue that the Court should exercise "judicial restraint" and defer to our elected representatives.

Anti-act advocates, like Republican state attorneys general, argue that the legislation is unconstitutional because it interferes with the economic liberty of individuals who do not want to buy health insurance.

However intriguing the constitutional question may be, an even more profound and illustrative constitutional dialogue emerged last week on that same topic between President Barack Obama, Judge Jerry Smith of the U.S. Court of Appeals for the Fifth Circuit and Harvard Law Professor Laurence Tribe:

First, in response to reporters' questioning, Obama said the Supreme Court would be taking an "unprecedented, extraordinary step" if it overturned the health care law.

A short time later, in a different but related health care case, Smith ordered the Justice Department to submit a three-page letter explaining its position on judicial review. The judge specifically asked Attorney General Eric Holder Jr. to clarify the president's remarks regarding the role of the courts in reviewing acts of Congress.

Then, in a post to CNN.com, Tribe examined the sequence of events and questioned the propriety of Smith's request for the three-page letter. He suggested that institutional respect is a two-way street, and Smith himself may have overstepped judicial decorum by actually ordering the Department of Justice to formally acknowledge the well-settled power of federal courts to declare congressional acts unconstitutional – a power that the Justice Department does indeed recognize as "beyond dispute".

Although the stakes were high, the words heated and emotions intense, no blood was shed. The rest of us could take in the gripping and dramatic words in the comfort and security



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of our armchairs scarcely mindful that in much of the world – Syria, for example – citizens are routinely losing their lives fighting for a modicum of the freedom we take for granted.

It behooves all of us, not just legal scholars, to ask now as never before: Why are we so fortunate? How have "We the People" secured such freedom while other countries – even some so-called democracies – could never dream of judges compelling presidents to obey judicial orders as occurred this week when three Fifth Circuit judges did just that.

Those judges ordered the Department of Justice and in turn the president himself to effectively acknowledge the power of the pen – the power of the pen to blow the power over guns and money out of the water. Wow. What a moment.

I'm reminded of a similar conversation more than 20 years ago in a different classroom. It occurred in a Kansas City, MO., inner city school. As a young lawyer, I was participating in the latest effort to integrate and improve public education by volunteering to teach a constitutional law class as part of a civics education program. I chose to start the class with *U.S. v. Nixon*, the landmark case that compelled President Richard M. Nixon to turn over the Watergate Tapes, which eventually led to his resignation as president of the United States. To illustrate how our constitution separates power between the branches of government, I drew on the chalk board the three branches: the executive (with a picture of guns symbolizing the President's power as commander in chief), the Congress (with a picture of money symbolizing the power of the purse), and the judiciary (with a picture of a

pen symbolizing the rule of law). I then asked if the kids could be any branch of government, which branch would they choose? None wanted the pen. They all wanted money or guns.

I then asked them why Nixon complied with the Court's order to turn over the Watergate Tapes when he controlled all those guns and had all that power. Why didn't he just say "no"?

After a long, uncomfortable silence, one boy raised his hand. He had been sitting in the back of the class, with his desk turned at a disrespectful angle to the front of the room, slouched in his chair, pants barely covering his lower torso, hat low over his eyes, but when I called on him, he slowly turned his eyes from the back wall, locked them on mine, and said:

"The court had the power of the peeps."

He got it! The power of the people rests on the power of an idea. That idea is embodied in a document. That's it. Articles I, II and III of the Federal Constitution collectively say this: Individual liberty is best secured by dividing power, but the check to aggrandizement of any one branch over another depends upon balance and respect.

Obama, Smith and Tribe all demonstrated this country's highest ideals this week. If it weren't so easily taken for granted, that give-and-take ought to take our breath away."

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