

Using All the Tools in the Toolbox



[1]While it is true that Congress makes the laws and the President executes them, it is also true that the President, the Cabinet, and a host of regulatory agencies spend countless hours interpreting and implementing the laws. Congress can never foresee all of the myriad details that must be worked out to actually turn a law into a functioning process. It falls to the executive branch to carry out that work through the regulatory process—the system of rulemaking and public comment that generally takes place after a law is enacted.

However, it is often the case that Members of Congress do not agree with how the executive branch has interpreted and implemented a law. Disputes of this nature can quickly escalate from simple disagreement to frenzied hyperbole. Consider the over-the-top political rhetoric which has characterized much of the immigration debate for many years, with any act of generosity towards an immigrant quickly labeled “amnesty” by some lawmakers. Such rhetoric quickly turns into a pitched battle between Congress, as the maker of the law, and the Administration, as implementer of the law.

The debate is not whether the President has the authority to revisit existing interpretations of laws. As the Bush Administration made clear, an administration has a duty to carry out the law to the best of its ability, which includes its interpretive ability. The Obama Administration has taken a first step in laying out clear guidance on prosecutorial discretion and forming a review committee, but it can’t stop there. Clear and transparent guidance on the implementation of the priority review process, and how that guidance will be implemented in making decisions about new cases, is needed and must be put out quickly. The much-maligned DHS memos, which looked at a range of options for re-interpreting existing guidance and regulations, still need to be revisited. If anything, the August 18 announcement opens the door for a more robust discussion of executive authority—one which the Obama Administration should embrace rather than hide from.

Unlike the case of NACARA, in which the Clinton Administration had the luxury of interpreting a new law, the Obama Administration—and the rest of us—are stuck with many laws that no longer work. Just like Secretary Chertoff when confronted by that realization, the answer is to use all the tools in your toolbox to make the best of the laws at your disposal. There will be disagreement, there will be political threats, but in the long run, the only way to really lose executive branch authority is through inaction based on fear of the consequences.

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