

James Madison and Alexander Hamilton discuss President Barack Obama

James Madison: Good morning, Alexander. I just read that that the U.S. Supreme Court in the case of *Zivotofsky v. Secretary of State Kerry*, has decided that the U.S. President, now Barack Obama, has the exclusive right to recognize formally a foreign power. Accordingly, it held that the 2002 statute that allowed U.S. citizens born in Jerusalem to list their birthplace as "Israel," was unconstitutional. I really am disturbed that, in spite of all our writing in the Federalist Papers, the U.S. is becoming an Imperial Presidency. I am very surprised that the Supreme Court has openly upheld a president who has defied an act of Congress on foreign affairs.

Alexander Hamilton: No James, I don't agree. I know there is an idea that a vigorous executive is inconsistent with the genius of republican government. But energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks. It is not less essential to the steady administration of the laws.

Madison: But surely presidential power is at a low ebb when it defies a Congressional law. We know our friend Montesquieu thought a separation of powers was necessary. Indeed, the different branches of government may, by their mutual relations, be the means of keeping each other in their proper places. Ambition must be made to counteract ambition. Devices are necessary to control the abuses of government. Men and women of upright, benevolent tempers have many opportunities of remarking how often the great interests of society are sacrificed to the vanity, to the conceit, and to the obstinacy of individuals.

Hamilton: A nation must have a single policy on foreign affairs. A feeble executive implies a feeble execution of the government. Whatever it may be in theory this means a bad government. Only the executive has the characteristic of unity, and with that comes the ability to exercise, to a greater degree, decision, activity, security, and dispatch. You remember that Montesquieu, in *L'Esprit des Lois* (Book XI, chapter 6), also described executive power as including the power to make peace or war, send or receive embassies, establish the public security, and provide against invasions.

Madison: Yes, that is true. But you yourself did say that the authority of the president to receive ambassadors and other public ministers is more a matter of dignity than of authority, and that it is of no consequence. The Supreme Court in this case did not question the substantial powers of Congress over foreign affairs in general or over passports in particular. Its decision was confined solely to the exclusive power of the president to act on the basis of power of making decisions about the recognition and legitimacy of a state or government, and its territorial boundaries.

Hamilton: You must remember that Jefferson remarked that the transaction of business with foreign nations is a matter for the executive. Indeed, the administration of government falls within the province of the executive department. The actual conduct of foreign negotiations, the application and disbursement of public money in conformity to the appropriations of Congress, and the direction of the operations of war, are properly the administration of government.

Madison: Yes but that conduct depends on both honesty and clarity. You notice that President Obama in his press conference in Germany on June 8, 2015 stated that the U.S. has made significant progress in pushing back the Islamic State (IS) from areas they had occupied or disrupted local populations. He said this at a moment when IS was advancing

and thousands of civilians were fleeing. You talk of clarity. Even more important, Obama confessed, blaming others, in relation to the fighting in Iraq that he did not have a complete strategy because it requires commitments on the part of others. He also remarked, in a very confusing way, that he had no alternative plan, and that the problem didn't need fixing. Hamilton. The problem remains, who is to judge the necessity and propriety of the laws to be passed for executing the laws of the country. I think the national government, in the first instance, must judge the proper exercise of its powers.

Madison: I don't agree. The legislature, the executive, and judicial departments of government ought to be separate and distinct. The accumulation of all powers, legislative, executive, and judicial, in the same hands may justly be pronounced the very definition of tyranny. The preservation of liberty requires that the three branches of power be separate and distinct. None of the departments can pretend to an exclusive or superior right of settling the boundaries between their respective powers.

Hamilton: Still the president is given authority to take care that the laws be faithfully executed, and Article II of the Constitution gives him executive power.

Madison: Well that's the problem. There are two important immediate issues, immigration and ObamaCare. The president has acted on both without Congress. In one case, Obama allowed health insurance companies to avoid cancelling whatever plans had not already been cancelled. Surely, the president cannot selectively ignore laws passed by Congress. In the other, Obama issued executive orders allowing five million Latinos to avoid deportation and many to receive work permits if they have children born in the U.S. or lived in the country for more than ten years.

✘ **Hamilton:** Well, presidential orders have been frequent in

American history. Obama is not the only president to issue executive orders. Remember some of the previous cases. Lincoln acted in this way, including the 1863 Emancipation Proclamation. Teddy Roosevelt issued 1,081 and FDR 3,721, executive orders, including one, no. 9066 in 1942, that was upheld by the Supreme Court 6-3, interning Japanese Americans during World War II. Affirmative Action and Equal Employment Opportunity came about by executive orders, and Harry Truman nationalized the steel mills by this device. Bill Clinton issued 364 and George W. Bush 291 orders. So far, Obama has issued only 206 executive orders.

Madison: That may be the case, but remember our mentor John Locke asked a relevant question. Who shall judge when this power is rightfully used? Surely none of the previous presidents would have acted as Obama has done in regard to the Independent Payment Advisory Board. It was appropriate for him to nominate the members to control Medicare spending, but not to give them authority to submit legislative proposals to Congress. Moreover, even more important, Obama more than any previous American president has issued a form of executive action known as the presidential memorandum.

Hamilton: Well the executive memos have been useful, on issues like control of firearms after the Sandy Hook school shooting, collection of data by the Department of Labor, instructions to the Department of Education on student loans and community colleges, standards of greenhouse gas emissions, on the nature of marriage, and raising the minimum wage for workers in new federal contracts.

Madison: You miss the essential fact that while executive orders must be published in the Federal Register and numbered, there is no such requirement for executive actions, nor can their cost be estimated. There are two problems. It is true that Congress can pass legislation overturning a presidential executive order, but he can veto that bill. It is also true that the courts have only on two occasions nullified executive

orders.

I would conclude from our pleasant discussion that the U.S. is not in immediate peril of Caesarism or imperial presidency. Nevertheless, President Obama should be aware that he is not alone in seeing that the nation is, and must be, ruled by law. He should be more restrained in his use of executive power and not automatically defy the views of other branches of the government, or issue threats if they do not accept his opinion. He should cooperate with Congress, not seek to get around it. We know he has a pen and a phone. He should take care that the pen does not run out of ink.

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