Liberals' Love-Hate Relationship With the Law

realclearpolitics.com/articles/2013/12/02/liberals_love-hate_relationship_with_the_law_120824.html

By Peter Berkowitz - December 2, 2013

The controversies raging about the merits of two very different Obama administration policies, the Affordable Care Act and addressing Iran's nuclear program, shed light on the common political outlook that underlies them.

President Obama's signature domestic initiative and his grandest foreign affairs undertaking alike reflect a defining feature of the progressive or left-liberal mind. Both betray an incoherent opinion, or rather incoherent set of opinions, about politics and law. In both cases, Obama began by exaggerating the primacy of the rule of law. Subsequently, without fanfare, apology, or apparent regret he blithely disregarded the requirements of law.

It's not unheard-of for a politician to change his tune to suit changing circumstances -- nor should it be. But the left-liberal tendency to exalt the supreme importance of the rule of law and then to nonchalantly set it aside when it is no longer expedient reflects something more than improvised adjustment to the needs of the moment. This attraction to the extremes is fueled by the same deep-rooted source.

The left-liberal mindset endemic on the college faculties and law schools where Barack Obama's political sensibilities were forged holds that morals and politics are subject to a universal reason to which the left-liberal sensibility is uniquely attuned. This conceit receives expression in a faith that the left-liberal brain trust can embody complex public policy in general rules and regulations, which can then be administered smoothly by well-educated bureaucrats and adjudicated impartially by empathetic judges.

At the same time, the left-liberal mind rebels against established authorities, hierarchies, and formalities that constrain its ability to pursue the people's good and social justice -- at least as it understands them.

Often enough, this rebellion turns against laws duly enacted by left-liberals themselves. Obamacare and the Iran nuclear deal are now demonstrating the destabilizing consequences of governing in accordance with a love-hate relationship toward the law.

The Affordable Care Act was grounded in enormous confidence in the power of law -- to redistribute wealth, bring health care to those who lacked it, improve the quality of insurance of those who already possessed it and, in the process, remake one-sixth of the nation's economy by putting it under tight government management.

The Affordable Care Act itself weighed in at around 2,700 pages. The regulations implementing it exceed 20,000 pages. Such was the confidence in the capacity of the transformative power of law that all this was undertaken by the Obama administration despite the opposition of all congressional Republicans, who represented a large legislative minority, and the opposition of a majority of the nationwide electorate.

More than three years after he signed the Affordable Care Act into law, as he began to grasp that its implementation was foundering, the president took a step without any basis in law. Last summer, just before Independence Day, Obama announced that he would suspend for a year the ACA's employer mandate, which requires businesses with 50 or more full-time employees to provide health insurance that conforms to new, exacting standards.

In taking this extraordinary step, the president certainly did not claim that he'd decided the duly enacted employer mandate was unconstitutional after all. Nor did he ask Congress, the lawmaking branch of the federal government, to change the law. Indeed, he promised to veto any such bill. He just acted by fiat.

Four months later, in mid-November, in the face of widespread popular discontent, Obama announced that he would allow insurance companies for a year to continue to sell insurance policies that violated ACA requirements. Again, he did not claim that the minimum insurance standards required by Obamacare's statutory language and the regulations his administration had promulgated were illegal, unconstitutional, or even ill-considered. And again, he rejected out of hand proposed legislation that would put outlawed insurance policies back in compliance. Instead, the president gave the insurance companies his blessing to engage in an illegal activity for a year.

The same inclination to exalt law combined with a penchant for peremptory lawlessness is visible in the Iran deal.

From the beginning, the administration has insisted on the cardinal importance of American observance of international law, most especially when dealing with Iran's nuclear program.

As it happens, international law regarding Iran is clear. In 2006, the United Nations Security Council passed Resolution 1696, which "Demands … that Iran shall suspend all enrichment-related and reprocessing activities, including research and development, to be verified by the IAEA." Since then, the Security Council has passed five more resolutions, most recently in June 2010, reaffirming Iran's obligation to halt all enrichment-related and reprocessing activities.

Under international law and the U.N. Charter, the United States has no legal authority outside of the formal framework of the Security Council -- either unilaterally or in cooperation with the P5+1 (the United States, the other four permanent members of the council, and Germany) -- to set aside these duly enacted resolutions demanding a halt to all of Iran's enrichment-related and reprocessing activities.

Article 25 of the U.N. Charter provides that “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.” Among other things, this core requirement of international law enables third countries -- supporters as well as opponents of Security Council decisions -- to form expectations and make plans based on the assumption that once the council has adopted a decision in accordance with established procedures, that decision cannot be undone except through those procedures.

Yet last week the Obama administration signed an interim deal that legitimizes Iran’s continued enrichment activities, in contradiction to Security Council resolutions. According to the agreement, while Iran must cease enriching uranium to 20 percent levels, Tehran may proceed with uranium enrichment up to 5 percent levels.

In addition, while the interim agreement prohibits Iran from operating its heavy-water production plant at Arak, which can be used to produce plutonium for nuclear weapons, the agreement permits Iran, in violation of U.N. resolutions, to proceed with the plant’s construction.

One can argue in his defense that the president is riding roughshod over international law in pursuit of a “comprehensive solution” to Iran’s nuclear program abroad and that his legislative shortcuts when dealing with health care policy at home are being carried out in pursuit of a noble goal: affordable health care for all Americans. With regard to both issues, Obama’s supporters claim -- and the president himself says -- that his practical approach to problem-solving is proof positive that he is not by nature an ideological person.

But Obama’s apparent appeal to pragmatism disguises his oscillation between extremes. One moment he is ideologically driven to use fealty to the rule of law to overcome the normal (if sometimes morally suspect) give-and-take -- the horse-trading, glad-handing, and compromise -- necessary for the effective practice of politics. Yet the next moment, he is ideologically driven to disdain legal process and the constraints of law.

The worthy alternative to the left-liberal sensibility is not one that is opposed to the universal claims of reason but rather one that involves a more judicious interpretation of reason. It holds, among other things, that it is unreasonable to attempt to make public policy decisions on the basis of abstract theories. It also emphasizes the wisdom of experience, and accords latitude to the exercise of practical judgment in balancing competing interests, opinions, and principles. It holds that government must be limited to secure the rights shared equally by all. And it holds that appreciating the limits of law is crucial to vindicating the majesty of the law.

You could call this way of thinking conservative. It was brilliantly displayed and eloquently defended in the speeches and writings of 18th-century British statesman Edmund Burke, the father of modern conservatism.

What is urgent, though, is to appreciate the stake that both left and right have in this more reasonable interpretation of reason and law, which is indispensable to the preservation of liberty at home and to the defense of the nation abroad.

Peter Berkowitz is a senior fellow at the Hoover Institution, Stanford University. His writings are posted at www.PeterBerkowitz.com and you can follow him on Twitter @BerkowitzPeter.