



MONTHLY COLUMN

Attorney General Mike Hilgers

Attorney General Mike Hilgers' Monthly Column: Separation of Powers and the Role of the Attorney General

In last month's column, I discussed the various functions and responsibilities of the Attorney General's Office. For this month's column, I want to focus on a very important role of your Attorney General—helping to ensure that the boundaries in the Constitution are respected. These boundaries are crucial to the functioning of our democratic republic.

One critical boundary is the “separation of powers.” This principle is straightforward—it means no one individual, or no one branch of government, has complete power. Thomas Paine once observed, “no country can be called free which is governed by an absolute power,” and our common sense and our knowledge of the human condition tells us that supreme power in one individual puts us on a dangerous path. Americans of goodwill—whether Democrat, Republican, or anything else—should be wary towards the concentration of power, no matter the policy at stake.

That means enforcing the United States Constitution. Our founding document distributes power in multiple ways. It distributes power between the states and the federal government, and it distributes power between various branches of the federal government. Congress has the power of the purse and the power to create legislation; it does not enforce laws. The President enforces legislation yet cannot enact laws. The Judiciary interprets laws, but it cannot enforce them.

The distribution of power sometimes may make change slower than one would like. Legislating is difficult and often times our preferred policy initiatives cannot muster the necessary votes to pass. When I served in the Nebraska Legislature, including as the Speaker, there were policy battles in which my preferred policy fell short of the votes needed to pass. The appropriate answer to those moments was to win more elections and persuade more people—not to give the Governor the power to write his or her own laws.

This principle is at stake in a current and important case pending before the United States Supreme Court, *Biden v. Nebraska*. Student-loan debt, including the causes of such debt and the impact on students and taxpayers, is a hotly debated topic in our country. And it is a topic that has grabbed the attention of Congress. During the 2019–2020 legislative session, more than [80 student-loan-](#)

[forgiveness bills](#) and other student-loan legislation were introduced in Congress, including a COVID-relief bill that provided for discharge of student loans up to \$10,000. Yet despite multiple opportunities to do so, Congress has not passed student-loan-discharge legislation.

Congress's refusal to enact such a law presents one set of choices for change—persuade more members of Congress or elect more members of Congress who would vote to discharge student loan debt. The Biden Administration decided that the loans should be discharged anyway—resulting in more than a \$400 billion hit to the federal treasury (far more than the annual budget of the Department of Homeland Security) without a vote of Congress. If Congress did not pass the specific student-loan-discharge bills, how could the President claim the authority to discharge those loans?

Through a 9/11-era bill known as the Higher Education Relief Opportunities for Students Act of 2003 ([HEROES Act](#)). But that law, which was enacted shortly after the start of the Iraq War, was passed for the primary purpose of ensuring that active-duty military may pause their student-loan payments while serving our country. Congress gave no hint when adopting the HEROES Act that it intended to eliminate student loans, let alone the massive amount of debt canceled through this program. And no administration has used it to erase student-loan debt.

How does the Administration justify its action? By claiming that we are in a national emergency because of COVID-19. But the Administration has repeatedly told the American public that the pandemic is over. The President cannot tell the public one thing and the Court another.

Nebraska, leading a coalition of other states, has called foul. Because the HEROES Act was never intended to provide this kind of widespread loan discharge, it does not contain the language necessary to support such an action. And because utilizing that law to support the discharge would allow the President to usurp the power of Congress, we have argued that the action was unlawful. The United States Court of Appeals for the Eighth Circuit put the program on hold, and the Administration has appealed to the United States Supreme Court. As this column publishes, the Court is considering the merits and has not acted yet.

The scope of the power the President claims is breathtaking and should alarm Americans of good faith and goodwill—no matter their political stripe and no matter what they think of the merits of the policy of student loan discharge. If the President's actions here are found lawful, you can bet that future Republican and Democrat administrations will scour old and obscure laws to find a slim legal hook to achieve their major policy preferences not contemplated by the original legislation.

National crises are problems to be navigated—not causes for amassing presidential power. Throughout the COVID-19 pandemic, the President keeps pushing his luck, and the Supreme Court keeps pushing back. The pandemic is now behind us. One can only hope the same is true of the President's efforts to use it to expand his powers.