

Testimony Before the House Committee on the Judiciary
“The Obama Administration’s Abuse of Power”
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Introduction

Chairman Smith and Members of the House Judiciary Committee. Thank you for the opportunity to testify today on an issue at the heart of our Constitution’s structure: the separation of government powers into three branches and the essential duty of the legislature to ensure that the executive branch does not exceed its rightful authority.

The Constitution envisions a balance of power among the three branches of government and, in particular, among the executive and legislative branches. This balance ensures that the executive branch may not operate without oversight from the people’s elected representatives in Congress. The need for such oversight can hardly be overstated: nothing less than individual liberty is at stake. If left unchecked, unrestrained, and unlimited, the executive branch—in its natural appetite for power—may take actions to destroy the liberty of the people.

Our discussion of excessive executive power is timely. In recent decades we have witnessed the executive branch claim for itself more and more government power. But this trend has reached new, disturbing levels under the current administration. President Obama has treated the Constitution’s separation of powers as if it were a matter of convenience that may be ignored when it gets in his way. Rather than cooperating with Congress or respecting the Constitution’s separation of powers, he has in many instances chosen to go it alone and in the process has exceeded the proper bounds of executive power. Today I will focus on President Obama’s unconstitutional recess appointments; his action to obstruct legislative oversight of his administration, including his abusive assertion of executive privilege; and his decision to issue an executive order contravening Congress’s immigration policy. But these are only a few of many instances in which President Obama has exceeded his rightful authority and ignored the Constitution’s checks and balances—actions that have resulted in an economy that is worse off and a people that is less free than when he took office almost four years ago.

Background

The Framers were well versed in the dangers of excessive government power. With the abuses of King George III fresh in their minds, they drafted our Constitution so as not to place all government power in a single department, but rather to divide power among three co-equal branches. As James Madison explained in Federalist 51, a properly framed Constitution must “enable the government to control the governed,” but it must also “oblige it to control itself” through internal checks and balances. To accomplish this internal control, the Constitution

provides each branch with the “the necessary [] means and personal motives to resist encroachments of the others.”¹ Without the effective functioning of these checks and balances, a single branch might accumulate all powers—legislative, executive, and judicial—a result that, in Madison’s words, “may justly be pronounced the very definition of tyranny.”²

Among the means the Constitution affords Congress to check the President’s power and ensure that he faithfully executes his responsibilities is the right to withhold consent for the President’s judicial and executive nominations. Article II, Section 2 of the Constitution provides that the Senate must advise and consent to the President’s appointment of judges and executive officers. The Senate has the responsibility, right, and duty to see that the President’s nominations have been properly considered and that the appointment will be for the good of the country.

Congress also has an essential oversight role with respect to the executive branch. As the branch tasked with enacting the nation’s laws, Congress must see that the executive branch enforces those laws faithfully and impartially. The value of such oversight can hardly be disputed. Since our country’s founding, the executive branch has grown in size from a small group—consisting primarily of the President, his cabinet, and a limited number of supporting employees—to a massive bureaucracy that employs hundreds of thousands of government officials, each of whom has motives and incentives that may be adverse to the liberty of the people. When executive officials make mistakes or exercise poor judgment, internal procedures will sometimes but not always remedy the problem. Inherent in our Constitution’s system of checks and balances is the need for Congress to have access and visibility into the executive branch’s administration of our laws to help ensure the proper functioning of the government.

Congress must also ensure that the executive branch does not usurp legislative power. Article I, Section 1 grants Congress “all legislative powers.” The Constitution’s requirement that only the legislature create legislation is important because it limits the scope and volume of legislation and it ensures that policy decisions are made by the people’s elected representatives. When an administrative agency makes broad legislative rules, or when it enacts regulations that contravene congressional policy, the executive branch violates Article I of the Constitution—something the executive branch has done with increasing prominence and frequency under President Obama.

In sum, the Constitution’s structural principles—separation of government powers and checks and balances—are essential to a properly functioning, limited government. Indeed, James Madison said of the principle of separation of powers that “No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty.”

¹ The Federalist No. 51 (James Madison).

² The Federalist No. 47 (James Madison).

Unconstitutional Recess Appointments

Since taking office, President Obama has sought to aggrandize his position and increase the executive branch's power at the expense of the Constitution, the legislative branch, and the liberty of the American people. In keeping with a pattern of Constitutional abuses, earlier this year President Obama sought to circumvent the Constitution's requirement that his appointment of executive officers receive the advice and consent of the Senate. On January 4, 2012, President Obama announced appointments to the Consumer Financial Protection Bureau and National Labor Relations Board, even though the Senate had refused its consent for one of the appointments and had not had an opportunity to consider the others. The President asserted that these appointments were made pursuant to the Constitution's Recess Appointment's Clause, even though the appointments occurred at a time when the Senate did not consider itself in recess. In fact, the appointments came one day after the Senate held a pro-forma session on January 3, 2012, and only two days before the Senate held another such session on January 6, 2012.

Even more troubling, in later justifying his unconstitutional appointments, the President relied on a Department of Justice memorandum, which asserted that the president may unilaterally decide when the Senate is and is not in session for purposes of the Recess Appointments Clause. Under the procedures set forth in the Constitution, it is for Congress, not the president, to determine when Congress is in session. Indeed, the Constitution expressly grants the Senate power to "determine the Rules of its Proceedings." To assert that the president has an unconstrained right to determine for himself when the Senate is or is not in session and to appoint nominees unilaterally at any time he feels the Senate is not as responsive as he might wish—even when the Senate is meeting and conducting business—is to trample upon the Constitution's separation of government powers and the system of checks and balances that animated the adoption of an advice-and-consent requirement in the first place. The Constitution's separation of powers is "not simply an abstract generalization in the minds of the Framers: it [is a principle] woven into the document that they drafted in Philadelphia in the summer of 1787."³ Surely, the Constitution's separation of powers can mean little if the executive is allowed to deprive the Senate of its constitutional right to make its own rules and determine for itself when it is and is not in session.

In addition, the Obama administration's assertion that the Senate's pro forma sessions are not cognizable for purposes of the Recess Appointments Clause violates past constitutional practice and tradition. In separate provisions, the Constitution provides that "[n]either House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days," and that "unless [Congress] shall by law appoint a different day," Congress shall begin each annual session by meeting "at noon on the 3d day of January." The Senate has

³ See *INS v. Chadha*, 462 U.S. 919, 945 (1983); see also *Mistretta v. United States*, 488 U.S. 361, 380 (1989) ("[It was] the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty.").

commonly, and without objection, used pro forma sessions to fulfill both constitutional requirements, evidencing a past consensus that such sessions are of constitutional significance. President Obama's novel assertion that such sessions no longer count for purposes of the Recess Appointments Clause thus upsets precedent and creates an internal contradiction in the treatment of Senate sessions for purposes of the Constitution.

It bears emphasis that President Obama's appointments were different in kind than previous recess appointments made by any president of either party. No president has ever unilaterally appointed an executive officer during an adjournment of less than three days. Neither, to my knowledge, has a president of either party ever asserted the power to determine for himself when the Senate is or is not in session for purposes of the Recess Appointments Clause.

In sum, President Obama disregarded the Senate's constitutional role in advising and consenting to the appointment of executive officials and instead made the appointments unilaterally. He then subsequently justified those appointments by asserting that it was for him, and not the Senate, to determine when the Senate is in session. With respect to the Recess Appointment's Clause, no President has attempted anything even remotely as dramatic, novel, and unconstitutional as what President Obama did on January 4, 2012.

Obstruction of Legislative Oversight

Another example of President Obama's refusal to respect the Constitution's separation of government powers occurred when he improperly asserted executive privilege in response to a legitimate congressional inquiry.

In the aftermath of troubling revelations relating to the so-called Fast & Furious operation, Congress exercised its oversight role and began seeking answers regarding who in the executive branch approved the practice of gun walking. In a February 4, 2011 letter sent in response to a congressional inquiry, the Department of Justice ("DOJ") asserted that the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") made "every effort to interdict weapons that have been purchased illegally and prevent their transportation to Mexico." Ten months later DOJ withdrew that letter, conceding it was false and misleading. Nonetheless, in response to continued congressional inquiries, the Obama Administration delayed and refused to provide relevant information. After Congress issued a subpoena for documents related to the administration's false February 2011 letter, the Obama administration again refused to comply and ultimately took the extraordinary step of asserting executive privilege over the requested material.

Courts have recognized two types of executive privilege: the "deliberative process privilege" and the "presidential communications privilege." The deliberative process privilege does not apply because government misconduct is the basis for Congress's request for

documents, and the privilege “disappears altogether when there is any reason to believe government misconduct has occurred.”⁴

With respect to the presidential communications privilege, the executive branch may only assert that privilege for communications made in “operational proximity” to the President—communications at a level “close enough to the President to be revelatory of his deliberations or to pose a risk to the candor of his advisers.”⁵ Accordingly, either high level administration officials were involved in misleading Congress, or the White House is improperly asserting executive privilege.

President Obama’s abusive assertion of executive privilege is particularly troubling given his promise to “creat[e] an unprecedented level of openness in Government,” and to “establish a system of transparency, public participation, and collaboration.”⁶ Instead of transparency and openness, President Obama’s administration has misled Congress and obstructed legitimate congressional oversight by concealing relevant documents and abusing executive privilege. In light of the tragic nature of the Fast & Furious operation—a misguided program that led to the death of a U.S. border patrol agent—and the need to understand the process within the executive branch that led to these poor judgments, President Obama’s refusal to allow legitimate congressional oversight is particularly repugnant to the Constitution’s separation of powers.

President Obama’s Refusal to Enforce Immigration Laws

President Obama’s abuse of executive power was again made manifest when, earlier this year, he issued an executive order providing that illegal immigrants who meet certain qualifications will receive a two-year deferral from deportation and may apply for work permits. By refusing to enforce the Immigration and Nationality Act—a law duly enacted by Congress—President Obama has failed to carry out his responsibility as chief of the executive branch. President Obama’s unilateral imposition of this controversial immigration directive is particularly dismissive of the legislative branch because it was issued after Congress specifically rejected immigration legislation embodying that policy.⁷

President Obama sought to justify his abuse of executive power by claiming that he may properly refuse to administer immigration laws under the traditional doctrine of prosecutorial discretion. But his new policy is different in kind than legitimate prosecutorial discretion. A blanket policy of non-enforcement of the law goes well beyond the kind of case-by-case analyses and decision making involved in prosecutorial discretion. By imposing on all government

⁴ *Id.* at 745, 746; see also *id.* at 737-738 (“[W]here there is reason to believe the documents sought may shed light on government misconduct, the [deliberative process] privilege is routinely denied on the grounds that shielding internal government deliberations in this context does not serve ‘the public interest in honest, effective government.’”).

⁵ *In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997).

⁶ Barack Obama, “Memorandum for the Heads of Executive Departments and Agencies, January 21, 2009,” WhiteHouse.gov (available at http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment).

⁷ See S.1545, the DREAM Act.

officials an immigration policy that Congress has rejected, President Obama has taken unilateral executive action that may fairly be characterized as a form of legislation. The Obama administration has thus violated Article II of the Constitution and the principle of separation of powers, which ensure that such contested policy decisions are made by the people's elected representatives in the legislature.

Conclusion

Quoting the French political thinker Montesquieu, who laid the intellectual framework for separation of powers, Madison wrote in Federalist 47, "When the legislative and executive powers are united in the same person or body, there can be no liberty, because apprehensions may arise lest *the same* [body] should *enact* tyrannical laws to *execute* them in a tyrannical manner."⁸ Facing opposition from Congress, President Obama has repeatedly sought to go it alone. By so doing, he has sought to unite in himself the government powers the Constitution properly places in three separate branches of government. It is thus all the more necessary and important that Congress continue to exercise its constitutional role and check this President's abuse of power.

⁸ The Federalist No. 47 (James Madison) (emphasis in original).