

**Written Statement**  
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*Confirmation Hearing For Attorney General Nominee Loretta Lynch*  
United States Senate Committee on the Judiciary  
United States Senate  
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**I. INTRODUCTION**

It is a great honor to appear before this Committee at such a historic moment: the confirmation hearing of Loretta Lynch to serve as the 83<sup>rd</sup> Attorney General of the United States. I have great respect for Ms. Lynch and her extraordinary career in our profession. Ms. Lynch has had a long and distinguished record that certainly justifies her consideration for this high position. My interest today is not to discuss Ms. Lynch as much as the Department that she wishes to lead.

First, for the purposes of introduction, my name is Jonathan Turley and I hold the J.B. & Maurice C. Shapiro Professor of Public Interest Law at George Washington University. I write and teach (and litigate<sup>1</sup>) in the area of constitutional law and legal theory, particularly on issues related to the separation of powers.<sup>2</sup> It is that focus that

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<sup>1</sup> I am not appearing today in my capacity as lead counsel in *The House of Representative v. Burwell* challenging the President's unilateral changes to the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) ("ACA"). While I will be discussing some aspects of the President's changes in the ACA, the specific arguments in *Burwell* should be left to the Court to resolve and I have avoided engaging in public discussions of those specific claims in deference to the Court.

<sup>2</sup> I have been asked to include some of my prior relevant academic publications. The most relevant include Jonathan Turley, *A Fox In The Hedges: Vermeule's Optimizing Constitutionalism For A Suboptimal World*, 82 U. CHI. L. REV. (forthcoming 2015); Jonathan Turley, *Madisonian Tectonics: How Form Follows Function in Constitutional and Architectural Interpretation*, 83 GEO. WASH. L. REV. (forthcoming Feb. 2015); Jonathan Turley, *Recess Appointments in the Age of Regulation*, 93 B.U. L. Rev. 1523 (2013); Jonathan Turley, *Constitutional Adverse Possession: Recess Appointments and the Role of Historical Practice in Constitutional Interpretation*, 2013 WIS. L. REV. 965 (2013); Jonathan Turley, United States House of Representatives, Committee on the Judiciary, "Reckless Justice: Did the Saturday Night Raid of Congress Trample the Constitution," May 30, 2006; Jonathan Turley, *Paradise Lost: The Clinton Administration and the Erosion of Presidential Privilege*, 60 MD. L. REV. 205 (2000) (Symposium); Jonathan Turley, "From Pillar to Post": *The Prosecution of Sitting Presidents*, 37 AM. CRIM. L. REV. 1049 (2000); Jonathan Turley, *A Crisis of Faith: Congress and The Federal Tobacco Litigation*, 37 HARV. J. ON LEGIS. 433 (2000); Jonathan Turley, *Through a Looking Glass Darkly: National Security and Statutory Interpretation*, 53 SMU L. REV. 205 (2000) (Symposium); Jonathan Turley, *Senate Trials and Factional*

brings me to the Committee today to discuss the current constitutional crisis between the Executive and Legislative branches, a crisis in which the Justice Department has played a dominant (and, in my view, a highly deleterious) role. As my writings indicate, I have been concerned about the erosion of the lines of separation in our system (and specifically the erosion of legislative authority) for many years. However, this concern has grown to alarm in the last few years under President Obama, someone whom I voted for and someone with whom I agree on many policy issues. We are watching a fundamental change in our constitutional system in the rise of a dominant Chief Executive, a type “uber presidency” that has evaded the limitations imposed by the Framers in our system. It certainly did not begin with President Obama, and I was previously critical of the action of President George W. Bush with regards to the loss of legislative authority. However, it has reached a dangerous constitutional tipping point under the current Administration. That aggrandizement of authority could not have occurred without the active support and catalytic role of the United States Justice Department.

The Justice Department, as an institution, has poorly served not just institutional but constitutional interests in the last decade through its consistent effort to expand executive authority. These policies often appear inherently hostile to fundamental principles contained within our constitutional systems from the separation of powers<sup>3</sup> to federalism,<sup>4</sup> privacy,<sup>5</sup> due process,<sup>6</sup> press freedom,<sup>7</sup> free speech,<sup>8</sup> and international law.

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*Disputes: Impeachment as a Madisonian Device*, 49 DUKE L.J. 1 (1999); Jonathan Turley, *The “Executive Function” Theory, the Hamilton Affair and Other Constitutional Mythologies*, 77 N.C. L. REV. 1791 (1999); Jonathan Turley, *Congress as Grand Jury: The Role of the House of Representatives in the Impeachment of an American President*, 67 GEO. WASH. L. REV. 735-790 (1999) (Symposium); Jonathan Turley, *Reflections on Murder, Misdemeanors, and Madison*, 28 HOFSTRA L. REV. 439 (1999) (Symposium); Jonathan Turley, *Dualistic Values in the Age of International Legisprudence* 44 HASTINGS L.J. 145 (1992).

<sup>3</sup> Jonathan Turley, *Restoring Balance Among The Branches In Washington* (With Sen. Ron Johnson), WASH. POST, June 27, 2014; Jonathan Turley, *The Rise of the Fourth Branch*, WASH. POST (Sunday), May 26, 2013; Jonathan Turley, *How Nixon Won Watergate*, USA TODAY, Mar. 26, 2013; Jonathan Turley, *Abuse Of Power: Obama’s Recess Appointments And The Constitution*, USA TODAY, Feb. 15, 2012.

<sup>4</sup> Jonathan Turley, *Politics by Other Means: Obama’s War on Pot*, USA TODAY, July 8, 2014.

<sup>5</sup> Jonathan Turley, *How Much Privacy Do You Expect? The Death of Privacy in America*, WASH. POST (Sunday), Nov. 13, 2011.

<sup>6</sup> Jonathan Turley, *The Hit List: The Public Applauds As President Obama Kills Two Citizens As A Presidential Prerogative*, USA TODAY, Oct. 4, 2011

<sup>7</sup> Jonathan Turley, *The Fourth Estate: Fifty Years After New York v. Sullivan*, USA TODAY, Mar. 13, 2014; Jonathan Turley, *Fire Eric Holder*, USA TODAY, May 29, 2013.

<sup>8</sup> Jonathan Turley, *Just Say No To Blasphemy Laws*, USA TODAY, Oct. 19, 2009, at 11A; Jonathan Turley, *The Death of Free Speech*, WASH. POST (Sunday), Oct. 14, 2012.

The implications of this trend are obviously chilling. However, the most serious threat is found in the controversies over the inherent power and limitations applicable to the presidency. Some of these conflicts are the manifestation of policies that can be undone, but the more fundamental attacks on separation principles threaten to change the very system under which our rights (and our future) are guaranteed. In my view, Attorney General Holder often appeared untethered by the constitutional moorings in the Vesting Clauses. As a result, he steered the Justice Department far outside of the navigational beacons in Article II.<sup>9</sup> The question is whether Ms. Lynch will (or can) tack back to calmer constitutional waters to the benefit of not only the integrity of our Constitution but the Department itself.

I believe that Ms. Lynch certainly has shown the personal strength and character to achieve such reforms, but the question remains of her commitment to do so. That is why confirmation hearings are so important during periods of constitutional crisis. A confirmation hearing is often misconstrued in the popular press as some type of ramped up “job interview.” However, confirmation hearings play an important role in the maintenance of the separation of powers. These hearings allow the Senate to measure not only the credentials of a nominee but also the fealty of the nominee to the fundamental principles governing this high office. We may all come from different political perspectives, but the Framers believed that we held a common article of faith in the structure and principles of our system. Indeed, some leaders like George Washington despised the very concept of political parties because he saw us as a nation united in a common constitutional bond. The question for a hearing of this kind is whether there remains a shared faith (and commitment) with a nominee, particularly with regard to the separation of powers. It is to that shared article of faith (and the threat posed by current Department policies) that I direct my comments today.

## **II. THE SHIFTING BALANCE OF POWER IN OUR TRIPARTITE SYSTEM**

The Separation of Powers is the very core of our constitutional system and was designed not as a protection of the powers of the branches but a protection of liberty. Given my recent testimony<sup>10</sup> and the specific question before this Committee, I will not

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<sup>9</sup> Jonathan Turley, *The Holder Years and the Perils of Politics Over Principle In Government*, USA TODAY, Sept. 26, 2014.

<sup>10</sup> See, e.g., Jonathan, Turley, United States House of Representatives, “*Authorization to Initiate Litigation for Actions by the President Inconsistent with His Duties Under the Constitution of The United States*” Before the H. Comm. On Rules, 113th Cong., July 16, 2014; Jonathan Turley, United States House of Representatives, “*Enforcing the President’s Constitutional Duty to Faithfully Execute the Laws*” Before the H. Comm. on the Judiciary, 113th Cong., Feb. 26, 2014; Jonathan Turley, United States House of Representatives, *The President’s Constitutional Duty to Faithfully Execute the Laws Before the H. Comm. on the Judiciary*, 113th Cong., Dec. 2, 2013; Jonathan Turley, United States House of Representatives, Committee on the Judiciary, “*Executive Overreach: The President’s Unprecedented “Recess” Appointments*,” Feb. 15, 2012.

go into length about this history. However, the consistent element running throughout the constitutional debates and the language of the Constitution is a single and defining danger for the Framers: the aggrandizement or aggregation of power in any one branch or any one's hands. The Framers actively sought to deny the respective branches enough power to govern alone. Our government requires consent and compromise to function. It goes without saying that when we are politically divided as a nation, less tends to get done. However, such division is no license to "go it alone" as the President has suggested. You have only two choices in our system when facing political adversaries: you can either seek to convince them or to replace them. This is obviously frustrating for presidents (and their supporters) who want to see real changes and to transcend gridlock. However, there is nothing noble in circumventing the Constitution. The claim of any one person that they can "get the job done" unilaterally is the very Siren's Call that our Framers warned us to resist. It is certainly true that the Framers expected much from us, but no more than they demanded from themselves. Regrettably, we have failed that test in recent years as evidenced by the growing imbalance in our tripartite system of government.

The balance sought by the Framers has been lost in recent years precisely as the Framers had feared: with the rise of a dominant executive who promises to achieve all of the things that the constitutional process could not. Again, President Obama was not the first to openly circumvent Congress, but this concentration of power has accelerated under his Administration. While I happen to agree with the President in many of these areas, I believe that he has chosen unworthy means to achieve worthy ends. The effort to establish unilateral authority presents an existential threat to our system of government. Although the President has insisted that he is merely exercising executive discretion, any such discretion by definition can only occur within the scope of granted authority and only to the extent that it is not curtailed by the language of the Constitution. This includes his obligation to faithfully execute the law. U.S. Const. art. II, § 3, cl. 4. Some of the President's actions can be viewed as within permissible lines of discretion. However, many of his actions cannot and are violations of his oath of office. That oath is not merely an affirmative pledge to defend the Constitution but to yield to its limitations on his own authority. To put it simply, that was the deal struck on January 20, 2013.

A classic example of the conflict between the branches is found in the prisoner exchange arranged to secure the release of Army Sgt. Bowe Bergdahl. The deal struck with the Taliban in Afghanistan allowed for the release of five Taliban commanders. On its face, the transfer would have been viewed as controversial on the basis of a trade with a terroristic organization alone, not to mention the specific individuals involved: including one who was the head of the Taliban army, one who had direct ties to al-Qaeda training operations, and another who was implicated by the United Nations for killing thousands of Shiite Muslims.<sup>11</sup> The point of mentioning this controversy is not to resolve the merits of the trade for Bergdahl but to acknowledge that this was a trade that the White House knew would raise legitimate issues of U.S. policy and precedent as well as security. It was in that sense, squarely in line with the very reason that Congress passed (and President Obama signed into law) Section 1035 of the National Defense

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<sup>11</sup> Kevin Sieff, *Freed Prisoners Were Battle-Hardened Taliban Commanders*, WASH. POST, May 31, 2014.

Authorization Act for Fiscal Year 2014. Section 1035 authorizes the Secretary of Defense to transfer or release individuals detained at Guantanamo Bay on the condition that the Secretary makes a specific determination and provides notification to “the appropriate committees of Congress of a determination . . . not later than 30 days before the transfer or release of the individual.”<sup>12</sup> This information-forcing provision required a “detailed statement of the basis for the transfer or release” and “[a]n explanation of why the transfer or release is in the national security interests of the United States.” *Id.* In addition to this provision, Section 8111 of the Department of Defense Appropriations Act, 2014 prohibits the use of “funds appropriated or otherwise made available” in the Department of Defense Appropriations Act, 2014, to transfer any individual detained at Guantanamo Bay to the custody or control of a foreign entity “except in accordance with section 1035 of the [FY 2014 NDAA].”<sup>13</sup> That makes the spending of money for such a purpose a violation of the Antideficiency Act.<sup>14</sup> When the Bergdahl swap occurred, I stated that the action clearly violated federal law.<sup>15</sup> Obviously, the lack of notice to Congress violated Section 1035. Moreover, the roughly \$1 million reportedly spent to achieve this purpose was a violation of Section 8111 and by extension the Antideficiency Act. The Congressional Accountability Office reached the same conclusion on August 21, 2014.<sup>16</sup>

The position of the Obama Administration in violating the law showed a distinct lack of good faith or even a credible denial. While some argued that President Obama was now claiming that the law was never valid due to his inherent power as Commander in Chief, the defense of the swap came not from the Justice Department but from the National Security Council spokesperson, Caitlin Hayden. She explained that “[b]ecause such interference would significantly alter the balance between Congress and the President, and could even raise constitutional concerns, we believe it is fair to conclude that Congress did not intend that the Administration would be barred from taking the action it did in these circumstances.”<sup>17</sup> The argument was rather bizarre on its face. Congress allowed for no waivers under the notice requirement—unlike other provisions under the 2014 National Defense Authorization Act.<sup>18</sup> As both Democratic and

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<sup>12</sup> National Defense Authorization Act for Fiscal Year 2014, H.R. 3304, 113th Cong. § 1035(d) (2013).

<sup>13</sup> Pub. L. No. 113-76, § 8111.

<sup>14</sup> 31 U.S.C. § 1341(a).

<sup>15</sup> *Bergdahl Deal and Congress*, CNN, June 2, 2014 (interview with Professor Jonathan Turley).

<sup>16</sup> Opinion, Congressional Accountability Office, *Department of Defense—Compliance with Statutory Notification Requirement*, August 21, 2014.

<sup>17</sup> Statement of NSC spokesperson Caitlin Hayden, June 30, 2014 (available at <https://www.documentcloud.org/documents/1180482-nsc-statement-on-30-day-transfer-notice-law.html>)

<sup>18</sup> Notably, Section 1035(a)(1) states “The Secretary of Defense is authorized to transfer or release any individual detained at Guantanamo . . . if the Secretary determines . . . the individual is no longer a threat to the national security of the United

Republican leaders indicated in the aftermath of the swap, such a reading of the law is facially absurd to the point of being insulting. Notably, even if the President were acting under his inherent authority, Section 1035 does not, itself, prevent the transfer of prisoners but rather requires disclosure of such transfers. Likewise, the very touchstone of congressional authority is the power of the purse. Section 8111 exercised that authority in barring the use of funds for a purpose deemed by Congress inimical to the national interest. The President's claim that he could simply disregard the law and then spend money expressly prohibited by federal law captures the new reality of our constitutional order. Admittedly, there are arguments that these laws did intrude upon Executive Authority and some academics consider the rise of a dominant president as not just an inevitable but also a positive development.<sup>19</sup> However, President Obama was effectively claiming both the right to ignore a disclosure provision as well as an appropriations limitation. Such a position could effectively negate a host of environmental, labor, and other laws by the same logic. The signature of a president or enactment of a law could no longer be viewed as an assurance that federal law would be recognized or enforced.

The rise of a dominant presidency has had a profound impact on our system. However, there is another and equally transformative change occurring within the system in the emergence of an effective "Fourth Branch" of government in the array of federal agencies and departments. While often discussed as part of the rising power of the presidency, I view it as distinct because the federal agencies are showing not just increasing independence from Congress but also increasing independence from the White House. Many scholars have described with approval the emergence of the "Age of Regulation" in the system of federal agencies. As I have previously written, these agencies now exercise sweeping discretion and authority in the regulation of every aspect of American life. The sheer size of these agencies puts the vast majority of their activities under self-regulation rather than direct congressional oversight. The degree of the range of inherent authority now claimed by agencies is evident in the well-known controversies over health care and immigration. However, it is equally clear in a host of other controversies that have drawn less attention. For example, as an academic, I have watched a running battle between the Department of Education ("DOE") and universities over the due process protections afforded to students accused of sexual harassment or assault. There is a valid need for schools to explore the ongoing problem of sexual assault and harassment on our campuses. It is essential that universities maintain rules that encourage and protect those who come forward to reveal such abuse. Academics have struggled to balance the interests in such cases to protect the accuser while maintaining due process protections for the accused. More can certainly be done to

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States." However, Defense Secretary Chuck Hagel made no such determination that Mohammad Fazl, Khairullah Khairkhwa, Mullah Norullah Noori, Mohammed Nabi, and Abdul Haq Wasiq were "no longer a threat to the national security of the United States." Indeed, such a determination would have been widely ridiculed given the history of these men.

<sup>19</sup> See generally Jonathan Turley, *A Fox In The Hedges: Vermeule's Optimizing Constitutionalism For A Suboptimal World*, 82 U. CHI. L. REV. (forthcoming 2015) (a review and critique of the work of Harvard Professor Adrian Vermuele).

guarantee that cases are reported and fully acted upon by universities. However, universities have faced escalating threats from the DOE that they have to either strip protections from accused students or face the loss of millions in federal funds. Faculty at Harvard and other schools have denounced what they see as the abandonment of core due process protections under threats from the DOE.<sup>20</sup> The direct source for the confrontation is not a congressional enactment but the unilateral action of Department officials in demanding changes that many academics, including myself, view as deeply troubling. A couple of years ago, universities received a “Dear Colleague” letter from Russlynn Ali, then assistant secretary for civil rights at the Department of Education. She explained that the reduction of protections for students was essential for preserving education as “the great equalizer in America.” The Department made the choice simple: either strip students and faculty of basic due process protections or be declared discriminatory. The changes left many academics gasping.<sup>21</sup> Some of these changes may have merit, but the point is that there has never been a debate over the right of the government to force such concessions from universities or what those concessions should be. Instead, there was an effective edict sent out to universities and colleges with a threat to be declared discriminatory institutions if they did not relent.

Some agencies have shown this legislative impulse not through the promulgation of new rules but through waivers of existing rules. Take the controversy over the Worker Adjustment and Retraining Notification (“WARN”) Act of 1988, which also illustrates the independence of the Fourth Branch. The WARN Act requires large employers to give 60-day advance notification to employees before termination.<sup>22</sup> However, on July 30, 2012, the Department of Labor (“DOL”) issued a guidance letter that simply waived the statutory requirement and told employers that they did *not* need to issue notice to employees before making layoffs due to sequestration. These notices were scheduled to be issued just days before the 2012 elections and thus the waiver was denounced as a political maneuver. Whatever the reason, the agency took it upon itself to create an exemption. Not only was this a legislative act but the Office of Management and Budget informed government contractors that the government would compensate them for legal costs if sued for violating the Act. Likewise, the Department of Health and Human Services, under Secretary Kathleen Sebelius, created its own waiver to the Temporary Assistance for Needy Families (“TANF”). TANF imposed conditions on the receipt of welfare benefits under Section 407. While the law does not enumerate waivers, it

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<sup>20</sup> See Nick Anderson, *Tally of Federal Probes of Colleges On Sexual Violence Grows 50 Percent Since May*, Wash. Post, Oct. 19, 2014; Juliet Eilperin, *Harvard Settles IX Case With Administration*, Wash. Post, Dec. 30, 2014 (quoting leading Harvard faculty like Professor Charles Ogletree Jr. in denouncing the changes as lacking “the most basic elements of fairness and due process.”).

<sup>21</sup> For example, in the past, many schools have required significant evidence to find students or faculty guilty, often a “clear preponderance” or “clear and convincing evidence.” These standards require less than the criminal “beyond the reasonable doubt” standard but still a 75% or 80% certainty of guilt. The administration, however, demands that schools adopt the lowest evidentiary standard short of a presumption of guilt — “preponderance of the evidence,” just slightly above a 50-50 determination.

<sup>22</sup> 20 U.S.C. § 2102(a)(2012).

expressly states that waivers granted under other sections of the law “shall not affect the applicability of section 407 to the State.” The Department simply ignored that clear language and crafted its own waiver in direct contradiction to the expressed intent of Congress.

The rise of both a dominant president and the Fourth Branch has shifted the center of gravity of our system—much at a cost to legislative power. That is a particularly dangerous change because it is in Congress that the disparate factional disputes are ideally transformed into majoritarian compromises. The pressure to compromise is only present in the system if the legislative system remains the sole course for bringing substantial change to federal laws and programs. If there is an alternative in unilateral executive action, the legislative process becomes purely optional and discretionary. The real meaning of a president claiming discretion to negate or change federal law is the discretion to use or ignore the legislative process. No actor in the Madisonian system is given such discretion. All three branches are meant to be locked in a type of constitutional synchronous orbit – held stable by their countervailing gravitational pull. If one of those bodies shifts, the stability of the system is lost.

### **III. THE JUSTICE DEPARTMENT AND THE EROSION OF LEGISLATIVE AUTHORITY**

The Justice Department has played a key role in facilitating the erosion of legislative authority and the rise of executive power over the years. This is particularly the case under Attorney General Eric Holder, who can accurately be described as leaving one of the most damaging legacies in terms of separation principles. Indeed, General Holder has opposed some of the most fundamental exercises of congressional authority and litigated what are some of the most radical claims in federal court. While prior Attorneys General avoided court challenges in areas like executive powers and privilege, Holder has litigated with comparative abandon. In so doing, Holder has racked up serious losses in federal court in advancing extreme claims of unilateral executive power. The role of the Justice Department, however, goes beyond its direct confrontations with Congress. Many of the most controversial agency actions are filtered through the Justice Department in anticipation of litigation. The Justice Department works behind the scenes of many controversies in anticipating potential litigation and serving as a gatekeeper in the release of policies that could implicate constitutional powers.

The Department has advanced a comprehensive attack on separation principles that is unprecedented in its scope. While presidents such as Richard Nixon were known to advocate an “Imperial Presidency” model, no Administration has been nearly as active in the pursuit of such unilateral authority as the Obama Administration. The number of such disputes would be difficult to present in a testimonial format. However, they can be divided into two categories of separation violations: the obstruction of legislative authority and the usurpation of legislative authority.

#### **1. Obstruction of Congressional Authority.**

The most common separation conflicts that occur in our system can be described as interbranch “relational” conflicts—problems that arise from the necessary interactions

between the branches in carrying out their respective roles. The branches are expected to cooperate on a certain relational level in the sharing of information and the maintenance of federal programs. Three areas of conflicts are of particular note vis-à-vis the Justice Department, as discussed below.

**Obstructing Oversight.** Congress acts at the very core of its authority under our system of checks and balances through its oversight and investigatory committees.<sup>23</sup> While the Constitution does not expressly reference congressional investigations, it is well established that such authority is derived from the mandate of “all legislative powers herein granted” in Article I, section 1. These committees directly enforce the principles of separation of powers in identifying and addressing abuses by the other branches.<sup>24</sup> There is no question that such committees tend to be more aggressive when dealing with an Administration from the rivaling party. I hardly have to inform members of this body that that is the nature of politics. To the extent that rivaling parties become more aggressive, supporting parties become more passive in dealing with encroachments of presidents. In the end, complaints from an Administration over partisan designs are of little import. Congress has a right to investigate federal agencies in determining whether to exercise its legislative powers. This includes investigations into the obstruction of committees, which is an act of contempt both of Congress and ultimately of the Constitution.

Various oversight committees have objected to the withholding of documents and witnesses in various investigations related to areas ranging from the Internal Revenue Service’s alleged targeting of conservative organizations to the Bergdahl prisoner swap. However, the controversy that best captures the obstruction of Congress in recent years is the response of the Obama Administration in the Fast and Furious investigation. The reason that Fast and Furious is particularly illustrative is for a couple of salient factors. First, no one (not even General Holder) defends the Fast and Furious operation, which proved as lethal as it was moronic. It is a prototypical example of a program that is legitimately a focus of congressional oversight authority. A federal agency was responsible for facilitating the acquisition of powerful weapons by criminal gangs, including weapons later used to kill United States Border Patrol Agent Brian Terry in December 2010. Congress has investigated not only the “gunwalking” operation, but also what it saw as concealment and obstruction, by the Administration, in its efforts to investigate the operation. Second, Congress had ample reason to expand its investigation after the Justice Department sent a letter on February 4, 2011 stating categorically that no gunwalking had taken place.<sup>25</sup> It was not until December 2011 that Attorney General

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<sup>23</sup> *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927) (“[T]he power of inquiry--with process to enforce it--is an essential and appropriate auxiliary to the legislative function.”).

<sup>24</sup> *See Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 505 (1975) (“The issuance of a subpoena pursuant to an authorized investigation is . . . an indispensable ingredient of lawmaking; without it our recognition that the act 'of authorizing' is protected would be meaningless.”)

<sup>25</sup> In the letter, Assistant Attorney General Ronald Weich wrote to Senator Grassley: “[T]he allegation . . . that [ATF] 'sanctioned' or otherwise knowingly allowed the sale of assault weapons to a straw purchaser who then transported them into Mexico — is false.

Holder informed Congress that it had been given false information and the letter was formally withdrawn. Congress responded by expanding the investigation into the false information given to it by the Executive Branch and the months of delay before Congress was informed of the misrepresentation of the facts underlying Fast and Furious. Finally, the position of the Justice Department on withholding documents has, in my view, been facially invalid and lacking in any credible good-faith interpretation of the executive privilege.

It is worth noting that the Administration in litigation over these claims presented the most extreme possible claims: not only refusing documents to investigatory committees in violation of legitimate legislative authority but contesting that a court can even rule on such a conflict in rejection of judicial authority.<sup>26</sup> As Judge Amy Berman Jackson wrote,

“In the Court's view, endorsing the proposition that the executive may assert an unreviewable right to withhold materials from the legislature would offend the Constitution more than undertaking to resolve the specific dispute that has been presented here. After all, the Constitution contemplates not only a separation, but a balance, of powers.”<sup>27</sup>

Judge Jackson was, if anything, restrained in her reaction. The Administration in the case gave full voice to a vision of an imperial presidency where the Chief Executive was accountable to literally no one in such disputes. Indeed, in what is strikingly poor judgment in litigation management, the Justice Department has continued to make this extreme argument despite previously establishing precedent against itself in prior years.<sup>28</sup>

After its admission of giving false information to Congress, the Justice Department's position has been conflicted and, in my view, incoherent from a constitutional standpoint.<sup>29</sup> After the House issued a subpoena for documents generated

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ATF makes every effort to interdict weapons that have been purchased illegally and prevent their transportation to Mexico.”

<sup>26</sup> *Comm. on Oversight & Gov't Reform v. Holder*, 979 F. Supp. 2d 1, 2-3 (D.D.C. 2013). The Department has adopted a position at odds with long-standing and some more recent precedent out of the D.C. Circuit. *See United States v. AT&T*, 551 F.2d 384, 390, 179 U.S. App. D.C. 198 (D.C. Cir. 1976) (“the mere fact that there is a conflict between the legislative and executive branches over a congressional subpoena does not preclude judicial resolution of the conflict.”); *see also Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008).

<sup>27</sup> *Holder*, 979 F. Supp. 2d at 3.

<sup>28</sup> This includes litigation stemming from the Bush Administration. *See Comm. on the Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 84 (D.D.C. 2008) (“[T]here can be no question that Congress has a right--derived from its Article I legislative function--to issue and enforce subpoenas, and a corresponding right to the information that is the subject of such subpoenas.”).

<sup>29</sup> The Administration did prevail in recently in the case of [Electronic Frontier Foundation v. U.S. Department of Justice](#), where the D.C. Circuit ruled that the Administration could withhold an OLC Opinion that allegedly authorized the FBI to obtain telephone records from service providers under certain circumstances without a

before and after February 4, 2011 only a partial production of documents was made by the Justice Department. Rather than recognizing the added burden of disclosure following its admitted false statement to Congress, the Department refused to produce clearly relevant documents. Then, in a June 20, 2012 letter, Deputy Attorney General, James M. Cole, informed Congress that the President had asserted executive privilege over documents dated after February 4, 2011. The stated rationale was that their disclosure would reveal the agency's deliberative processes. That position was clearly overbroad and unsupportable given the scope of documents withheld. Giving false information to Congress runs to the core of oversight duties. Whatever the definition of deliberation may be for a court, lying to Congress and then knowingly withholding unprivileged documents is not within any reasonable definition of that term. Indeed, the Justice Department seemed hopelessly or intentionally unclear as to the scope of deliberative privilege, particularly in the distinction between this exception under FOIA and the common law versus its meaning under constitutional law.<sup>30</sup> Moreover, the invocation of executive privilege on the day of the hearing over the contempt of Congress deepened the confusion. In his June 20, 2012 letter, Deputy Attorney General Cole stated:

[T]he President, in light of the Committee's decision to hold the contempt vote, has asserted executive privilege over the relevant post-February 4 documents. The legal basis for the President's assertion of executive privilege is set forth in the enclosed letter to the President from the Attorney General. In brief, the compelled production to Congress of these internal Executive Branch documents generated in the course of the deliberative process concerning the Department's response to congressional oversight and related media inquiries would have significant, damaging consequences. As I explained at our meeting yesterday, it would inhibit the candor of such Executive Branch deliberations in the future and significantly impair the Executive Branch's ability to respond independently and effectively to congressional oversight. Such compelled disclosure would be inconsistent with the separation of powers established in the Constitution and would potentially create an imbalance in the relationship between these two co-equal branches of the Government.

I remain unclear about what the Justice Department believes is a more troubling “imbalance” than its denial to Congress of clearly material evidence needed for oversight.

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"qualifying emergency." The D.C. Circuit ruled that, since the FBI did not adopt the recommendation, the opinion was not “working law” that would have to be turned over under the Freedom of Information Act. Yet, under FOIA, agencies must disclose their “working law,” i.e. the “reasons which [supplied] the basis for an agency policy actually adopted.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 152-53 (1975). However, once again, this is not the same standard that applies to Congress. Moreover, even if the standard were the same, the fights with Congress involved documents that were withheld for months but later recognized to be unprivileged.

<sup>30</sup> 5 U.S.C. § 552(d) (FOIA “is not authority to withhold information from Congress”); *Murphy v. Dep’t of the Army*, 613 F.2d 1151 (D.C. Cir. 1979) (holding that deliberative process and FOIA exemptions are inapplicable to Congress).

Congress was investigating the Department's false statement and withholding of clearly unprivileged documents from the oversight committee. The position of the Department was that it could unilaterally withhold material that might incriminate its own conduct and officers through a largely undefined claim of deliberative process.

This confusion deepened further when the Department later admitted that virtually all of the documents withheld for months were unprivileged. On November 15, 2013, the Attorney General stated in court filings that he was withholding documents responsive to the Holder Subpoena that “do not . . . contain material that would be considered deliberative under common law or statutory standards.”<sup>31</sup> Congress has a legitimate question of why the documents were withheld when they clearly were not privileged. The notion of a deliberative process privilege claim over non-deliberative documents was also made in the letter of General Holder to President Obama seeking a sweeping claim of executive privilege: “[b]ecause the documents at issue were generated in the course of the deliberative process concerning the Department’s responses to congressional and related media inquiries into Fast and Furious, the need to maintain their confidentiality is heightened. Compelled disclosure of such material, *regardless of whether a given document contains deliberative content*, would raise ‘significant separation of powers concerns.’”<sup>32</sup>

In addition to a hopelessly confused notion of deliberative process, the Justice Department has failed to explain why it was clearly within the authority of Congress to demand production of documents to determine whether officials knew that the Department was giving false information to Congress in the February 4, 2011 letter but somehow Congress had no such authority to material showing whether and when officials know of the falsehood after February 4, 2011. Both sets of material concerns allegations of lying to Congress as well as the American people. Under the claims advanced by the White House, not only would courts be closed to challenges of presidents withholding evidence but also any material deemed in any way responsive to congressional inquiries would be per se privileged and capable of being withheld at the discretion of the Department.

***Blocking Contempt Prosecution.*** One of the most troubling aspects of the Fast and Furious investigation was not just the withholding of non-privileged material but the later refusal of the Justice Department to submit the alleged violation to a grand jury—despite a historic vote of the House of Representatives finding General Holder in contempt. The decision to block any prosecution was a violation of a long-standing

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<sup>31</sup> Def.’s Mot. For Certification of This Ct.’s Sept. 30, 2013 Order for Interlocutory Appeal . . . at 8-9 (Nov. 15, 2013).

<sup>32</sup> Letter of Attorney General Eric Holder To President Barack Obama, June 19, 2012 (citing *WHCO Documents Assertion*, 20 Op. O.L.C. at 3) (emphasis added) (available at [http://www.justice.gov/sites/default/files/olc/opinions/2012/06/31/ag-ff-exec-priv\\_0.pdf](http://www.justice.gov/sites/default/files/olc/opinions/2012/06/31/ag-ff-exec-priv_0.pdf))(citing *WHCO Documents Assertion*, 20 Op. O.L.C. at 3). The letter based this view on the claim that such disclosure to Congress would “significantly impair” its “ability to respond independently and effectively to matters under congressional review.” *Id.*

agreement between the branches and represents a serious affront to the institutional authority of this body.

Congress has the inherent right to find officials in “inherent contempt” and actually hold trials to that effect.<sup>33</sup> Indeed, an inherent contempt proceeding was held as recently as 1934.<sup>34</sup> The Justice Department has long bristled at the notion of contempt proceedings handled by the legislative branch and supported the use of the criminal contempt process created in 1857 where a house approves a contempt citation and then either the Speaker of the House or Senate President certifies the citation to the United States Attorney for the District of Columbia under 2 U.S.C. § 194 (2000). This system was based on assurances from the Justice Department that it would be a neutral agent in advancing such claims. In recent years, however, the Justice Department has repeatedly blocked the submission of claims against members of the Administration and most recently the Attorney General himself.

Before addressing the most current case, it is important to return to the original power of Congress to handle such matters itself. While Congress has been put into the position of seeking approval of the Justice Department, even in the indictment of its own officers, the Supreme Court long recognized the inherent contempt power that could be exercised directly by Congress. For example, in *Anderson v. Dunn*,<sup>35</sup> the Court dismissed a civil action brought by a contumacious witness. The Court noted in a statement that now seems tragically prophetic that the denial of such inherent authority would lead:

to the total annihilation of the power of the House of Representatives to guard itself from contempts, and leaves it exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, may mediate against it. This result is fraught with too much absurdity not to bring into doubt the soundness of any argument from which it is derived. That a deliberate assembly, clothed with the majesty of the people, and charged with the care of all that is dear to them, composed of the most distinguished citizens, selected and drawn together from every corner of a great nation, whose deliberations are required by public opinion to be conducted under the eye of the public, and whose decisions must be clothed with all that sanctity which unlimited confidence in their wisdom and purity can inspire, that such an assembly should not possess the power to suppress rudeness, or repel insult, is a supposition too wild to be suggested.<sup>36</sup>

While the courts would curtail inherent contempt authority to keep its use confined to

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<sup>33</sup> This investigatory authority admittedly got off to a rocky start in *Kilbourn v. Thompson*, 103 U.S. 168, 189 (1880), where the Supreme Court questioned “the right of the House of Representatives to punish the citizen for a contempt of its authority or a breach of its privileges.” *Kilbourn*, however, involved a private business venture in which the federal government had invested. That case involved the imprisonment of a businessman, who was later released by a federal court. However, by 1927, in *McGrain v. Daugherty*, , the inherent authority of Congress to pursue such investigations was strongly affirmed in its handling of the Teapot Dome scandal.

<sup>34</sup> MORTON ROSENBERG & TODD B. TATELMAN, CONG. RESEARCH SERV., RL34114, CONGRESS’S CONTEMPT POWER: A SKETCH 7 (2007).

<sup>35</sup> 19 U.S. (6 Wheat) 204 (1821).

<sup>36</sup> *Id.* at 228-29.

legislative matters,<sup>37</sup> it was affirmed as inherent to the legislative investigatory powers that must be exercised by Congress.

In one of the most recent confrontations, it was a Democratically controlled House of Representatives that sought prosecution for contempt of Bush Administration officials. Following the dismissal of nine United States Attorneys in 2006, both the House and Senate Judiciary Committees sought testimony and documents to address allegations that the dismissals were politically motivated. While the Bush White House offered interviews to be conducted behind closed doors for former White House Counsel Harriet Miers and other officials, it would not agree to transcribed interviews or the release of all of the documents sought by the committees. On June 13, 2007, the House Judiciary Committee issued two subpoenas. The first named Miers to both give testimony and produce documents.<sup>38</sup> The second was directed to White House Chief of Staff Joshua Bolten for the production of documents. President George W. Bush then asserted executive privilege to withhold both the testimony and the documents. That led on July 25, 2007, to the adoption of recommendation for contempt citations for Bolten and Miers by the full House Judiciary Committee and, on February 14, 2008, to a vote of contempt by the full House.<sup>39</sup> However, after certification by then Speaker Nancy Pelosi of the contempt vote to then United States Attorney for the District of Columbia Jeffrey Taylor, the Attorney General announced that (because the Administration was deemed correct in its use of Executive Privilege), “the [Justice] Department will not bring the congressional contempt citations before a grand jury or take any other action to prosecute Mr. Bolten or Ms. Miers.”<sup>40</sup> This led to the Miers litigation discussed above. However, the refusal to bring the claim to the grand jury captured the breakdown of the agreement between the branches over the use of statutory criminal contempt procedures. The Executive Branch has steadily expanded its view of the Executive Privilege and then cited its own view to bar the investigation of its own officers.

This same circular process was seen in the Fast and Furious controversy. The Obama Administration now claims that material may be withheld from Congress under a dubious deliberative process claim “regardless of whether a given document contains deliberative content” because release of such material would raise “significant separation of powers concerns.” So, the Administration (with the guidance of the Justice Department) first invokes overbroad executive privilege claims and then, when Congress seeks contempt prosecution, it cites its own overbroad executive privilege claims as the basis for refusing to give the matter to a grand jury. I have had criminal defense clients who would only envy such an ability to cite the basis for a criminal charge as the defense to a criminal charge. What is particularly breathtaking is that the Administration itself would confirm the non-privileged status of documents wrongly withheld from Congress but still insist that no grand jury could find such conduct the basis for a contempt charge.

The current status of contempt powers in Congress is clearly untenable. To put it

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<sup>37</sup> See, e.g., *Marshall v. Gordon*, 243 U.S. 521, 536 (1917).

<sup>38</sup> *Miers*, 558 F. Supp. 2d at 61.

<sup>39</sup> 154 Cong. Rec. H962 (Feb. 14, 2008) (registering a final vote of 223 to 32).

<sup>40</sup> Letter from Attorney General Michael B. Mukasey to Representative Nancy Pelosi, Speaker of the House 2 (Feb. 29, 2008), online at <http://judiciary.house.gov/hearings/pdf/Mukasey080229.pdf> (visited Sept 1, 2009).

simply, the Justice Department has created a constructive immunity from congressional contempt through its expansive privilege claims. Indeed, it has taken roughly 200 years since *Anderson v. Dunn*, but the Justice Department has achieved in statutory criminal contempt what the Court feared with regard to inherent contempt: “the total annihilation of the power of the House of Representatives to guard itself from contempts, and leave[] it exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, may mediate against it.”

***Refusing To Defend Federal Law.*** Just as the Justice Department violated a basic commitment to be a neutral agent on contempt prosecutions, it violated a similar commitment to Congress when Attorney General Eric Holder announced that the Administration would abandon the defense of the Defense of Marriage Act (“DOMA”) signed into law by President Bill Clinton.<sup>41</sup> Once again, I shared President Obama’s opposition to DOMA, and I have strongly supported same-sex marriage. However, the abandonment of the defense of DOMA produced uncertainty over the standing of anyone to defend the law and could well have resulted in the termination of the law by effective default. It did not serve the legal process to obscure the important legal issues in the recent Supreme Court cases with questions of standing and representation. While an Attorney General may have perfectly good reasons to oppose a law, the solution is not to abandon the law and leave Congress without a voice in the courts. DOMA was still a law passed by Congress and many, including some on the Court, believed it to be constitutional. As with the contempt controversy, one cannot assert the near absolute right to represent the Legislative Branch and then refuse to defend its laws. Holder should have appointed outside counsel to defend the law in the name of the government if he found the task to be ethically barred. We should all want a full and fair consideration of those arguments without artificial limitations presented by litigation abandonment. Ultimately, the maneuver almost led the striking down of the law without a resolution of the merits in *United States v. Windsor*.<sup>42</sup> The Court was divided on the standing of members to defend DOMA with both Chief Justice Roberts and Associate Justice Scalia rejecting standing arguments by the House of Representatives’ Bipartisan Legal Advisory Group (“BLAG”). The majority, however, found sufficient Article III standing despite the fact that the Obama Administration abandoned the defense of the federal law. It found prudential reasons for accepting the case to guarantee adversarial process and other interests.<sup>43</sup> It would have been deeply troubling to see a major piece of federal law killed

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<sup>41</sup> See Press Release, U.S. Dep’t of Justice, Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html> (notifying Congress of President’s determination that statute was unconstitutional and declining to defend the statute).

<sup>42</sup> 133 S. Ct. 2675 (2013).

<sup>43</sup> Justice Kennedy specifically noted “the prudential problems inherent in the Executive’s unusual position” and the risk that the abandonment of the defense of the law would deny the Court of a “real, earnest and vital controversy.” *Windsor*, 133 S. Ct. at 2687. The Court held that “prudential considerations demand that the Court insist upon ‘that concrete adverseness which sharpens the presentation of issues upon which the court

by default because the Attorney General simply did not send anyone to argue its merits. Yet, after the decision (and the criticism of some members of the Court), Attorney General Eric Holder encouraged state Attorneys General to follow this same course in abandoning defense of their own state laws.<sup>44</sup> Given the division over standing in *Windsor* and the denial of standing in its sister case of *Hollingsworth*,<sup>45</sup> General Holder's advice is in my view inimical to the legal process. There is a difference between refusing to personally defend a law and leaving a law undefended. The interests of justice demand that courts are given an adversarial presentation of arguments—a requirement that is openly obstructed when the government withdraws from representation and fails to appoint individuals to defend a law.

In fairness to the Obama Administration, the non-defense of a statute viewed unconstitutional has been a long and divisive issue in academia. The Office of Legal Counsel has long maintained that there are rare circumstances where a President can legitimately decline to enforce or defend a law. However, these have been described as cases where a law is “clearly unconstitutional.”<sup>46</sup> While I viewed the law as unconstitutional, there was a host of cases supporting the law and there were deep divisions over the possible basis for striking down the law. Indeed, the President himself had spent years in office equivocating over same-sex marriage and his Administration spent years defending DOMA and related laws like Don't Ask, Don't Tell in court. In my view, the obligation of the Justice Department ran to Congress to fulfill its commitment that, as the nation's litigator, it would defend federal laws. Otherwise, non-defense can become an alternative means to negate federal laws by withdrawing anyone with clear standing to defend them.

## **2. Usurpation of Legislation Authority.**

Where the controversies over subpoenas and contempt involved the resistance of legislative authority to investigate the Executive Branch, other controversies involve the intrusion into legislative authority. Once again, the Justice Department has played a critical role in such expansion in areas ranging from online gambling<sup>47</sup> to educational waivers to immigration deportations to health care decisions. I would like to briefly address two examples of how the Department has advocated the usurpation of legislative

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so largely depends for illumination of difficult constitutional questions.” *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

<sup>44</sup> Evan Perez, *Eric Holder Becomes An Activist Attorney General*, CNN, Feb. 25, 2014.

<sup>45</sup> *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

<sup>46</sup> Recommendation that the Dep't of Justice Not Defend the Constitutionality of Certain Provisions of the Bankr. Amendments and Fed. Judgeship Act of 1984, 8 Op. O.L.C. 183, 194 (1984) (noting that “[i]t is generally inconsistent with the Executive's duty, and contrary to the allocation of legislative power to Congress, for the Executive to take actions that have the practical effect of nullifying an Act of Congress.”).

<sup>47</sup> Leah McGrath Goodman, *How Washington Opened The Floodgate on Online Poker*, Newsweek, August 14, 2014 (discussing role of the OLC in reversing long-standing federal interpretation barring online gambling).

authority in the areas of recess appointments and health care.

***Recess appointments.*** The recent controversy over recess appointments highlights not only the extreme interpretations advanced by the Obama Administration over executive power but the ill-conceived litigation strategy of the Justice Department.<sup>48</sup> The four appointments made by President Obama in January 2012 were done in open circumvention of Congress and open violation of the Constitution. President Obama had previously submitted the nomination of Richard Cordray to serve as the first Director of the Consumer Financial Protection Bureau. Cordray himself was not really the issue. As discussed below, confirmation hearings are often about the department rather than the nominee. The nomination was blocked by forty-five Senators in a filibuster over a disagreement with the President on the accountability and funding of the bureau.<sup>49</sup> I testified on those appointments and advised Congress that I viewed them as flagrant violations of Article I and Article II.<sup>50</sup> The Justice Department (in an Office of Legal Counsel opinion) not only supported the appointments as constitutional but also then litigated the case in establishing negative rulings in both the United States Court of Appeals for the District of Columbia and the United States Supreme Court in *National Labor Relations Board v. Canning*.<sup>51</sup> The D.C. Circuit<sup>52</sup> held that the President’s interpretation of recess appointments violated the separation of powers and that “[t]o adopt the [government’s] proffered intrasession interpretation of ‘the recess’ would wholly defeat the purpose of the Framers in the careful separation of powers structure . . . [a]llowing the President to define the scope of his own appointments power would eviscerate the Constitution’s separation of powers.”<sup>53</sup> The Supreme Court reached the same result by unanimous decision, though it split 5-4 on the rationale.

The decision to litigate *Canning* was particularly interesting given the refusal to defend DOMA. While DOMA had many good-faith arguments in favor of constitutionality and precedent supporting the law, the Obama Administration abandoned the case on appeal. That case could have easily gone either way based on the prior precedent and was not “clearly unconstitutional” to warrant abandonment regardless of the President’s view of the merits. On the other hand, there appeared little debate in the Administration to litigate *Canning* despite the prior negative ruling and the far stronger

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<sup>48</sup> See generally Jonathan Turley, *Recess Appointments in the Age of Regulation*, 93 B.U. L. REV. 1523 (2013); Jonathan Turley, *Constitutional Adverse Possession: Recess Appointments and the Role of Historical Practice in Constitutional Interpretation*, 2013 WIS. L. REV. 965 (2013).

<sup>49</sup> While Cordray became the focus of the controversy, Obama also appointed three individuals to the National Labor Relations Board.

<sup>50</sup> Jonathan Turley, United States House of Representatives, *The President’s Constitutional Duty to Faithfully Execute the Laws Before the H. Comm. on the Judiciary*, 113th Cong., December 2, 2013; Jonathan Turley, United States House of Representatives, Committee on the Judiciary, “Executive Overreach: The President’s Unprecedented “Recess” Appointments,” February 15, 2012.

<sup>51</sup> 573 U.S. \_\_\_\_ (2014).

<sup>52</sup> *Canning v. NLRB*, 705 F.3d 490, 502 (D.C. Cir. 2013).

<sup>53</sup> *Id.* at 503–04.

indicators of unconstitutionality in the President's action. There remains an uncertain line drawn by the Obama Administration of when it will litigate a constitutional position (in its own assertion of authority) and when it will abandon such a claim (in legislation passed by Congress).

The actions taken on recess appointments, in my view, represented a flagrant and premeditated violation of the Constitution. The partisan divide over the case was baffling for a Madisonian scholar. Congress' authority over this critical control on agencies was directly contested by the intrasession appointments. Yet, in the prior hearings, members seemed to desperately argue against the appeal on the merits and, in so doing, seemed to argue for their own institutional obsolescence. The presumed fail safe protections in the system seemed to fail in this case—all, that is, but one. Congress waffled in responding to an attack on its authority while the Justice Department failed to show independent, apolitical judgment in reviewing the matter. Ultimately, the independent judiciary maintained the power of Congress over confirmations, even though the Obama Administration again argued that no court could review its actions in the area as a matter of standing.

**Health Care.** Another emblematic area of usurpation is found in health care changes. Once again, I support national health care and the goals of President Obama. There have been dozens of changes in deadlines and other provisions under the ACA. Again, I happen to agree with some of these changes but that does not change the fact that they are in direct conflict with legislative text. For example, Congress originally mandated that non-compliant policies could not be sold after October 1, 2014. That provision was unpopular with certain groups and the Obama Administration unilaterally ordered a two-year extension that allowed insurance companies to sell non-compliant, and thus unlawful, policies until October 2016.<sup>54</sup> Another such change occurred with regard to the deadline for private employers with more than 50 full-time employees.<sup>55</sup> This deadline was viewed by some as a critical element of the law and was arrived at after considerable debate. The Act expressly states that these provisions would become active on January 1, 2014.<sup>56</sup> However, the Administration moved unilaterally to set its own deadline and thereby suspend annual penalties that would have brought in huge revenues in sanctions to the extent that businesses did not comply.<sup>57</sup> It simply stated that the employer mandate and its reporting obligation “will not apply for 2014.”<sup>58</sup> That

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<sup>54</sup> Centers for Medicare & Medicaid Services, “Extended Transition to Affordable Care Act-Compliant Policies, Mar. 5, 2104, *available at* <http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/transition-to-compliant-policies-03-06-2015.pdf>.

<sup>55</sup> 26 U.S.C. §4980H (c)(2)(A).

<sup>56</sup> *See* ACA § 1502 (e).

<sup>57</sup> This sweeping change was announced on a Treasury Department blog under a title that must have been jarring for many in Congress: “Continuing to Implement the ACA in a Careful, Thoughtful Manner.”

<sup>58</sup> U.S. Dept. of Treasury, “Continuing to Implement the ACA in a Careful, Thoughtful Manner,” July 2, 2013, *available at* <http://www.treasury.gov/connect/blog/pages/continuing-to-implement-the-aca-in-a-careful-thoughtful-manner-.aspx>. The Administration subsequently issued official

change cost the government an estimated \$10 billion in annual revenue.<sup>59</sup> Then on February 10, 2014, the Administration again altered the statute by exempting employers with between fifty and ninety-nine full-time employees from all aspects of the employee-coverage requirements until 2016.<sup>60</sup>

In the resulting litigation, the Justice Department has advanced the same extreme interpretations of executive authority in defending the changes to the ACA. I would like to focus on one such controversy that is currently before the United States Supreme Court in *King v. Burwell* and before the D.C. Circuit en banc in *Halbig v. Burwell*.<sup>61</sup>

The focus of these cases is the interpretation of portion of the ACA governing state and federal exchanges. Congress established the authority of states to create their own exchanges under Section 1311. If states failed to do so, federal exchanges could be established under Section 1321 of the Act. However, in Section 1401, Congress established Section 36B of the Internal Revenue Code to authorize tax credits to help qualifying individuals purchase health insurance. In Section 1401 expressly links tax credits to qualifying insurance plans purchased “through an Exchange *established by the State* under 1311.” The language that the qualifying exchange is “established by the State” seems quite clear, but the Administration faced a serious threat to the viability of the Act when thirty-four states opted not to create exchanges. The Administration responded with an interpretation that mandates that any exchange—state or federal—would now be a basis for tax credits. In adopting this statutory construction, the Administration committed potentially billions in tax credits that were not approved by Congress. The size of this financial commitment without congressional approval also strikes at the essence of congressional control over appropriation and budgetary matters.

The Fourth Circuit and the D.C. Circuit ultimately split over this issue, though I believe that the D.C. Circuit was more faithful to the Constitution in its rejection of the Administration’s claims.<sup>62</sup> Regardless of where the Supreme Court emerges on the issue, the constructive amendment to the ACA presents a serious challenge to legislative authority when it strikes a balance of interests in such provisions. The unilateral change also shows the ascendancy of the Fourth Branch described above. The substantial

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guidance in IRS Notice 2013-45, *available at* <http://www.irs.gov/pub/irs-drop/n-13-45.PDF>.

<sup>59</sup> See Congressional Budget Office, “Analysis of the Administration’s Announced Delay of Certain Requirements Under the Affordable Care Act,” *available at* <http://www.cbo.gov/publication/44465>.

<sup>60</sup> U.S. Dept. of Treasury, “Continuing to Implement the ACA in a Careful, Thoughtful Manner,” July 2, 2013, *available at* <http://www.treasury.gov/connect/blog/pages/continuing-to-implement-the-aca-in-a-careful-thoughtful-manner-.aspx>. The Administration subsequently issued official guidance in IRS Notice 2013-45, *available at* <http://www.irs.gov/pub/irs-drop/n-13-45.PDF>.

<sup>61</sup> See Jonathan Turley, *Goodbye Hobby Lobby, Hello Halbig: Get Ready For An Even Greater Threat To Obamacare*, L.A. TIMES, July 1, 2014.

<sup>62</sup> As I have written, I consider both the Fourth and D.C. Circuits to present compelling arguments even if I disagree with the result in *King*. See Jonathan Turley, *Red and Blue: Attacks on Judges In Health Care Rulings Are Unjustified*, USA TODAY, July 30, 2014.

alterations ordered in this and other provisions shows vividly how legislation is being treated as merely a starting point for agencies in our new Administrative State. It is not enough for presidents to defend such actions as improving a law or acting in the absence of congressional changes. Opposition in Congress, even gridlock, is no excuse to dictate the outcome unilaterally on one's own terms. As important as national health care is, the integrity of our system demands an equal Legislative Branch and the compulsory participation in the carefully constructed legislative process.

#### IV. THE ROLE OF CONFIRMATION HEARINGS IN RESOLVING INTERBRANCH CONFLICTS

While the Framers were familiar with British ministries' and colonies' charter governments,<sup>63</sup> the new Administrative State is far beyond what any Framers could have imagined within the federal system.<sup>64</sup> However, the Framers understood the concentration of power and fought to resist it to give each branch the interest and ability to protect their own constitutional powers. In *Federalist No. 51*, James Madison explained the essence of the separation of powers—and the expected defense of each branch of its constitutional prerogatives and privileges:

But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition.<sup>65</sup>

The separation of powers was an imperative in its own right not because of an inherent desire for divided government, but because it was viewed as a necessary safeguard to the natural encroachment and corruption of power. In recent years, Congress has become relatively passive in exercising the full panoply of powers to resist executive encroachment. The current fight over the obstruction and usurpation of legislative authority has been building for years. As my friend, Walter Dellinger, noted in prior testimony during the Bush Administration, the encroachment of executive power has become a threat to the separation of powers and a direct challenge to the obligation of presidents to faithfully execute federal

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<sup>63</sup> Indeed, much of the separation of powers embodied in the Constitution was viewed as an implied rejection of the British model. See, e.g., William S. Livingston, *Britain and America: The Institutionalization of Accountability*, 38 J. POL. 879, 880 (1976) (“[A] number of quite fundamental institutions in the American system marked a direct reaction against things British, and were adopted by the Americans as a means of avoiding problems which they perceived as prompted by British error.”).

<sup>64</sup> See *City of Arlington v. FCC*, 133 S. Ct. 1863, 1878 (2013)(C.J., Roberts, dissenting) (“The Framers could hardly have envisioned today’s ‘vast and varied federal bureaucracy’ and the authority administrative agencies now hold over our economic, social, and political activities.”).

<sup>65</sup> THE FEDERALIST NO. 51, at 257 (James Madison) (Lawrence Goldman ed., 2008).

laws.<sup>66</sup> Professor Dellinger called upon “the next President [to] commit to respecting important structural safeguards that check against presidential aggrandizement.”<sup>67</sup> That has regrettably not happened. Instead Congress has faced an attack on its authority that is unprecedented in scope in the context of modern presidencies.

Confirmation hearings take on added importance during such constitutional crises. Indeed, confirmation hearings have grown in importance as congressional authority has declined vis-à-vis federal agencies. As I have noted in some of my recent scholarship, confirmation hearings have developed into an important check on agency abuse and now perform a unique dialogic role between the political branches.<sup>68</sup> While Congress holds the power of the purse, this power is far more limited than academic work would often suggest. The threat to cut off funding to agencies that administer critical social programs or perform critical social functions is considered by many to be the ultimate “nuclear option.” The shared appointment power, by contrast, offers Congress a less drastic method to not only raise conflicts but also force answers from agencies. It is becoming more common to see agencies stonewalling Congress or failing to fully answer committees on matters of public interest.

Confirmation hearings necessarily raise not just the credentials but also the policies to be pursued by a nominee, particularly when there is an impasse with Congress and the agency. Indeed, such hearings often force commitments for changes or policies to assure the Senate that a candidate is prepared to respect the basic conditions of interbranch relations and privileges under the Constitution. Recently, I read with some interest the statement of former Solicitor General Charles Fried who noted that he was expressly asked for assurances on his future actions in offices and felt duty bound to fulfill those promises.<sup>69</sup> Confirmation hearings allow Senators to confirm new

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<sup>66</sup> *Restoring the Rule of Law Before the S. Comm. on the Judiciary*, Sept. 16, 2008 (Joint Statement of David Barron and Walter Dellinger) (criticizing President Bush for violating the Separation of Powers and ignoring congressional authority) (“Under this Administration, lawyers in the Executive Branch have wildly misinterpreted what the Constitution says about the extent of presidential authority, and as a result the President has erroneously claimed the authority to disregard laws that he is obligated to follow.”).

<sup>67</sup> *Id.* This advice also included a well-deserved criticism of the Office of Legal Counsel for “the failure of the OLC in the current Administration to live up to its proper role – including its willingness to operate as an advocate and to offer thinly plausible, or even implausible, legal justifications for the President’s policy goals.” *Id.* at 8. That advice was also ignored.

<sup>68</sup> For a conflicting view, see Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935-2000*, 61 OHIO ST. L.J. 1361, 1437 (2000) (arguing that the shift in the balance of power in the appointments process in favor of the Senate leads to more extreme and more partisan nominees).

<sup>69</sup> Fried was specifically referring to one of the areas of current conflict with the Justice Department in the failure to defend a federal law. See Charles Fried, *The Solicitor General's Office, Tradition, and Conviction*, 81 FORDHAM L. REV. 549, 550 (2012) (“Every Solicitor General . . . goes through a little dance [during] his or her confirmation hearings. . . . [I]f confirmed, [will you] defend the constitutionality of acts of Congress?”

commitments and direction for departments. In so doing, past conflicts can be reduced or, in the very least, directly addressed between the branches.

Consider again the controversy over the Consumer Financial Protection Bureau (CFPB). While Congress notably threatened to withhold funds for the CFPB, it first used its confirmation authority to try to force the President to the negotiation table on the structure and function of the Bureau.<sup>70</sup> The Senate's decision to block Cordray's confirmation was tied directly to its opposition to the Bureau he had been appointed to lead. Congress was faced with an agency that it viewed as unresponsive to prior congressional concerns over unchecked administrative power and control of the appropriation of funds. With the reduction of congressional control over federal regulatory decision-making, the Congress turned to the confirmation process as a vehicle to influence agency policy and operations. The Dodd-Frank Act created sweeping authority for the "orderly liquidation" of financial institutions.<sup>71</sup> Not only were Republicans concerned about undefined core terms like "financial stability," but also about the abridgment of access to the courts and the ability to appeal agency decisions.<sup>72</sup> Of course, these terms were approved by Congress and thus previously subject to the legislative process. But the Act shifted an extraordinary degree of rulemaking authority to the agencies, an estimated 243 new rulemakings to be promulgated by eleven different agencies affecting trillions of dollars, with little real involvement of Congress. The Cordray nomination provided a vehicle for forcing the White House to come to compromise with the legislature on this agency's new powers and the rules it could be expected to promulgate. Once Cordray had been confirmed, the ability of the Senate to exact such concessions would be greatly reduced.

Given the discretion afforded agencies (which are protected in the judicial system under such decisions as *Chevron*, *Dominion*, and *Lane*),<sup>73</sup> the confirmation of agency and

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'Yes, Mr. Chairman, . . . unless no colorable argument can be made in their defense or unless they trench on the prerogatives of the executive branch.'").

<sup>70</sup> In 2013, the Senate confirmed Cordray as part of a deal to avoid the "nuclear option." Alexander Bolton, *Deal: Nuclear Option Averted As GOP Blinks*, Hill, July 17, 2013 ("By agreeing to advance his nomination, Republicans basically threw in the towel on their demands to reform the Bureau").

<sup>71</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (The purpose of the Act is "to provide for orderly liquidation of any such company under title II").

<sup>72</sup> Todd Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace*, 81 GEO. WASH. L. REV. 856, 859-65 (2013).

<sup>73</sup> *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (holding that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer"); *Dominion Energy Brayton Point v. Johnson*, 443 F.3d 12, 16 (1st Cir. 2006) (holding that an "'agency's reasonable interpretation [of the law] be accorded deference if there is any ambiguity as to [Congressional] intent'" (quoting *Citizens Awareness Network, Inc. v. United States*, 391 F.3d 338, 348 n.4 (1st Cir. 2004))); *Lane v. U.S. Postal Serv.*, 964 F. Supp. 1435, 1437 (D. Nev. 1996) (stating that "where Congress has delegated a policy decision to an

sub-agency heads is one of the most direct ways for Congress to try to influence or curtail decisions of the government. Congress' direct hold over agency and sub-agency heads is limited to the critical decision of confirmation. While Congress may engage in informal consultation, it does not have a formal voice in the selection of a nominee and retention of a confirmed official. As Alexander Hamilton noted in the *Federalist Papers*, “[t]here will, of course, be no exertion of *choice* on the part of the Senate. . . . [T]hey can only ratify or reject the choice [the President] may have made.”<sup>74</sup> Obviously, Senators are free to vote on any basis for the confirmation or the rejection of a nominee. They can vote for good reason, bad reason, or no reason at all. However, Senators in the past have demanded assurances on how a Department will perform its duties going forward as a condition for confirmation. For example, the past obstruction of oversight committees and failure to defend federal laws can be viewed as fundamental breaches in interbranch relations that demand resolution before confirmation.

More than any other department, the Justice Department has played a key role in facilitating the attack on congressional authority. The confirmation of an Attorney General necessarily raises the question of not just whether she will lead a federal department but what department she will lead. The Justice Department was once viewed as an apolitical institution that rose above political infighting and maintained a principled approach to the interpretation of the Constitution, particularly in deference to the separation of powers. In recent years, it has become both overly antagonistic and litigious with regard to the exercise of well-established legislative powers.

An example of this change can be found in the Office of Legal Counsel. The OLC long held a revered position within the Justice Department for its objective and apolitical analysis. Unlike other offices within the Department, which advocate the position of the Administration, the OLC was viewed as the voice for constitutional values and the rule of law. However, in recent years, the OLC has issued opinions that are highly troubling in their conclusory and, frankly, shallow analysis. I raised this concern in the hearing on the recess appointment controversy. I have read compelling arguments on both sides of this debate from academics for whom I have great respect. Accordingly, I was not necessarily expecting agreement from the OLC on the issue. However, I was expecting a fair and frank discussion of the constitutional implications of intrasession appointments. Instead, the January 6, 2012 opinion of Assistant Attorney General Virginia Seitz read more like an advocacy brief than detached analysis. Seitz reached an extreme position on the scope of recess appointment powers resolving every interpretative question in favor of the President. For example, by categorically rejecting the notion of pro forma sessions as avoiding a recess, the Seitz opinion insisted that it did not have to address how long or how short a recess can be to justify a recess appointment.<sup>75</sup> It essentially solved the problem by changing the question. By

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agency, separation of powers concerns make it inappropriate for a court to substitute its judgment for that of the agency”).

<sup>74</sup> THE FEDERALIST NO. 66, at 328 (Alexander Hamilton) (Lawrence Goldman ed., 2008) (emphasis in original).

<sup>75</sup> Op. O.L.C. at 9 n.13. (“Because we conclude that pro forma sessions do not have this effect [that the Senate is unavailable to fulfill its advice-and-consent role], we need not decide whether the President could make a recess appointment during a three-day

effectively saying that the President decides what is and what is not a session for the purposes of the Clause, it concluded that these are not sessions to the satisfaction of the President.<sup>76</sup> Ironically, while the OLC insists that the President may define terms that completely negate congressional powers, it also insists that Congress cannot define such basic terms as whether it is in session if a President disagrees. The previous cases deferring to congressional definitions on what constitutes a session reflect the fact that it is the Congress that determines when it will meet and conduct business. The OLC simply brushed aside the fact that courts routinely defer to Congress on how it defines and conducts its business. Article I expressly leaves it to members to “determine the Rules of its Proceedings.”<sup>77</sup> Thus, the Supreme Court has held “all matters of method [of proceeding] are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate or even more just.”<sup>78</sup> The OLC instead suggested that the only way for Congress to protect its constitutional right of advice and consent would be for “[t]he Senate [to] remove the basis for the President’s exercise of his recess appointment authority by remaining continuously in session and being available to receive and act on nominations.”<sup>79</sup> The OLC notably never tries to justify such an extreme position in terms of the original or logical purpose of the Clause in the overall context of the appointment process. Nor does it explain why an intrasession recess is not a transparently artificial excuse when Congress is in session and only a matter of days away from advice and consent—and conferral had already been made in the earlier session with unsuccessful results. Even the broader interpretations of recent administrations have acknowledged that the length of a recess can be determinative, including prior conflicting opinions of Attorneys General that were barely acknowledged by the OLC.<sup>80</sup> In advancing this consistently broad interpretation of the Clause, the OLC opinion relegates to footnotes or dismisses outright the opposing views of past Attorneys General.

The great irony is that this President would have been better served by the OLC exercising greater detachment from political controversies like that over recess

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intrasession recess. This Office has not formally concluded that there is a lower limit to the duration of a recess within which the President can make a recess appointment.”)

<sup>76</sup> *But see* Letter from Elena Kagan, Solicitor General, Office of the Solicitor General, to William K. Suter, Clerk, Supreme Court of the United States 3 (Apr. 26, 2010); *New Process Steel, L.P. v. NLRB*, 560 U.S. \_\_\_, 130 S.Ct. 2635 (2010) (“[T]he Senate may act to foreclose [recess appointments] by declining to recess for more than two or three days at a time over a lengthy period.”).

<sup>77</sup> U.S. CONST. art. I, § 5, cl. 2.

<sup>78</sup> *United States v. Ballin*, 144 U.S. 1, 5 (1892) (“It is a continuous power, always subject to be exercised by the house, and within the limitations suggested, absolute and beyond the challenge of any other body or tribunal.”).

<sup>79</sup> Op. O.L.C. at 1.

<sup>80</sup> Memorandum of Jack L. Goldsmith III to Alberto R. Gonzales, Counsel to the President, Re: Recess Appointments in the Current Recess of the Senate at 1 (Feb. 20, 2004) (noting that “a recess during a session of the Senate, *at least if it is sufficient length*, can be a ‘Recess’ within the meaning of the Recess Appointments Clause”) (emphasis added).

appointments. A more balance and cautionary analysis might have avoided years of litigation, confusion over the legitimacy of prior CFPB decisions (by recess appointees), and ultimately a unanimous vote of the Supreme Court against the Administration.

## V. CONCLUSION

The Justice Department is more than some rogue agency at odds with congressional oversight. It is the very architect of the effort to expand executive power beyond the limits imposed by the Framers. There seems a culture at the Justice Department to instinctively resist every assertion of congressional authority or any limitation on presidential power. That is not the function of the Department. Lawyers are supposed to zealously defend their clients, but the real client of the Justice Department is not the President and certainly not itself. It is the American people. They are being poorly represented in case after case where the Justice Department seeks to block judicial review and to obstruct legislative authority. Underlying this effort is a distorted view of the Department's role in our government and an even more distorted view of our government itself. To paraphrase George Orwell's "*Animal Farm*," the position of the Justice Department appears to be "All branches are equal, but some branches are more equal than others."

It is difficult to evaluate a nominee without understanding her commitment to change the course of the Department in these confrontations with Congress. Whether it is the overboard claims of executive privilege or the unilateral authority of the President to negate statutory language or the non-defense of federal laws, there remains a fundamental disagreement over the obligations and function of this Department within our system. In exercising its power to confirm a nominee, the Senate has an undeniable interest in confirming that a nominee will not continue policies inimical to the balance of power in our system.

As I have stated, I have no reason to doubt the integrity and intentions of Ms. Lynch, who has reached this point in her career by displaying obvious leadership and strength of character. It is my sincerest hope that she will use this historic opportunity to open a new chapter in relations between the branches and to restore some of the luster to this proud Department. The Justice Department should be the embodiment of the common article of faith shared by all Americans in a system of separate and limited powers. I can only imagine the intense pride of not just Ms. Lynch but her family when she takes the oath to serve as the highest law enforcement figure in the nation. When that moment comes, and I hope that it does, there should be a clear understanding on the part of both Congress and the nominee as to what she is swearing "true faith and allegiance" as the 83<sup>rd</sup> Attorney General of the United States of America.

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